In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 77-176

MINERAL VENTURES, LIMITED,
an Oregon corporation,

Petitioner,

v.

CECIL ANDRUS, SECRETARY OF THE
INTERIOR OF THE UNITED STATES
OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

APPENDIX

AUTHORITIES CITED

CASES

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The petitioner, Mineral Ventures, Limited, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 3, 1977.

OPINION BELOW

The opinion of the Court of Appeals was not reported. It is set out in the

Appendix A-1. The District Court for the District of Oregon granted summary judgment against the petitioner. A-3, A-11. The Court of Appeals affirmed.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 3, 1977. This petition for certiorari was filed within 90 days after that date.

The Supreme Court of the United States has jurisdiction under 28 USC §1254(1).

The United States Court of Appeals for the Ninth Circuit had appellate jurisdiction under 28 USC §1291.

The District Court for the District of Oregon had jurisdiction to make judicial review of administrative action under the Administrative Procedure Act, 5 USC §701 et seq.

The Department of the Interior had no jurisdiction over the subject matter for failure to prove compliance with the conditions upon which its limited jurisdiction is made to depend under 30 USC §613.

QUESTIONS PRESENTED

First: WHETHER IT WAS ERROR FOR THE COURT OF APPEALS TO UPHOLD THE DISTRICT COURT'S SUMMARY JUDGMENT IN A JUDICIAL REVIEW OF AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT, WHERE THE ADMINISTRATIVE RECORD SHOWS SUBSTANTIAL CONTROVERSY AS TO MATERIAL FACTS.

Second: WHETHER THE WHOLE RECORD, INCLUDING FACTS IN FAVOR OF THE MINING CLAIMANT, SHOULD HAVE BEEN SCRUTINIZED BY THE DISTRICT COURT AND SUBSTANTIALITY OF EVIDENCE JUDGED BY WHATEVER IN THE RECORD FAIRLY DETRACTS FROM EVIDENCE CLAIMED TO SUPPORT AGENCY ACTION.

Third: WHETHER WHEN MAKING JUDICIAL REVIEW OF ADMINISTRATIVE PROCEEDINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT, THE DISTRICT COURT MUST MAKE FINDINGS OF FACT AND RULE ON REQUESTS BY A PARTY FOR FINDINGS.

Fourth: WHETHER PROOF OF STRICT COMPLIANCE WITH THE PROCEDURAL CONDITIONS OF 30 USC §613 IS ESSENTIAL TO FORESTRY'S AUTHORITY TO INITIATE AND INTERIOR'S JURISDICTION TO TRY A PROCEEDING TO DETERMINE TITLE UNCERTAINTIES ON MINING CLAIMS LOCATED PRIOR TO JULY 23, 1955.

STATUTES AND RULES

Administrative Procedure Act, 5 USC 706.

"Sec. 706 Scope of review
To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed, and
(2) hold unlawful and set aside

agency action, findings and conclusions found to be--

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(b) contrary to constitutional right, power, privilege or immunity;
(c) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;
(d) without observance of procedure required by law;
(e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393."

The Administrative Procedure Act, 5 USC §557 (c) relating to agency findings, is set out in the Appendix, A-63.

The Surface Resources Act - procedure for determining title uncertainties, 30 USC §613, is set out in the Appendix A-58.

Rule 56 of the Federal Rules of Civil Procedure concerning summary judgment is

set out in the Appendix, A-64.

STATEMENT OF THE CASE

Petitioner is the owner of unpatented mining claims: the Enterprise, Swamp, and Extension of Swamp, in Section 13, Township 41 South, Range 7 West, Willamette Meridian, in the Althouse Mining District, Josephine County, Oregon. The claims were located for gold long prior to the Surface Resources Act of July 23, 1955.

The Department of Agriculture, United States Forest Service, initiated Contest OR-09999 E, and the Department of the Interior asserted jurisdiction to determine title uncertainties as to claims recorded prior to July 23, 1955, under 30 USC §613. In 1973, the agency entered its decision divesting petitioner of certain rights to the surface of its claims and making the claims subject to the provisions of Section 4 of the Act of July 23, 1955 (Public Law 167). The Interior Board of Land Appeals affirmed. A-12.

Petitioner sought judicial review in the United States District Court for Oregon, where the reviewing court entered summary judgment against the petitioner. The court did not rule separately on each of the requested findings of fact submitted to the court by the petitioner.

The United States Court of Appeals for the Ninth Circuit vacated and remanded the case to the District Court. The Court of Appeals ruled: "The judgment below should be vacated and remanded for

the entry of an amended judgment granting to the Secretary the relief demanded with reference to claims within the State of Oregon only." [A-2].

The fact issue is whether the auriferous deposit in the canyon in Green's Creek, extending through the contested claims, was discovered to be a valuable deposit within the meaning of 30 USC §22 prior to July 23, 1955.

Colver Anderson, sole witness for Forestry, does not claim to have a degree in mining engineering, nor did he ever operate a gold placer deposit. His expertise is in metallurgy. He was not called in rebuttal. No rebuttal or denial was offered to the specific facts established by the contestee's experts.

The witnesses who gave evidence for the plaintiff were qualified and experienced. The mining claimant offered the testimony of Dr. Christopher Buckley, Ph. D. (economic geology, Rice), the evidence of Dr. Arthur S. Radke, Ph. D. (geology, Stanford University), presently with the U.S.G.S., the evidence of Ronald D. Bernard, B. Sc. (engineering, Oregon State University, M. Sc. Hydrology, Stanford University), Daniel F. Cutshall, B. Sc. (geology, San Jose State University) and his bulk sampling, Bob Watson, a practical miner, and his bulk sampling, done under supervision of Dr. Bernard L. Gabrielsen, Ph. D. (engineering, Stanford), together with Exhibits A through N, Q and R, gold nuggets, reports by the Oregon State Department of Geology and

Mineral Industries and by the California Department of Mines to prove the discovery of a valuable mineral deposit on the contested ground prior to July 23, 1955.

Dr. Gabrielsen calculated that $2 per cubic yard was the average gold content of the bank run material of the deposit. Tr 106. His calculations took into account 217 cubic yards of samples.

Anderson took into account only 1-1/2 cubic yards of measured samples. The first was 1/2 yard, which ran 18¢ per cubic yard. The second was a one yard sample which ran 54¢ to the cubic yard. Tr 22.

Dr. Gabrielsen and Dr. Buckley testified from their experience that small samples were not representative of the deposit. Tr 76, 158.

The 100 yard bulk sample taken from the deposit by hydraulic mining proves that the deposit can be mined by that method. Dr. Gabrielsen testified that he intended to hydraulic mine the deposit. He said that hydraulic mining can be done for a few cents per yard, maybe as cheap as ten cents a yard. The costs were less in 1955. Tr 74-75.

When asked whether the material he sampled was alluvial or eluvial, Anderson said he would not draw that fine a line. Tr 34. But he agreed that knowledge of the geology of the area is certainly important to a determination whether placer gravel has potential. Tr 47.

Anderson testified that the gold he found was in glacial gravel. Tr 28. Dr. Buckley sampled an alluvial stream deposit. Tr 173-173.

Mr. Anderson's examination and sampling did not appraise correctly the gold values in the deposit, for the evidence shows that he did not realize that the present day stream carries, in addition to the rough, angular gold which has come from nearby lodes, the worn, rounded gravel laid down in the channel of an ancient river, which the modern stream has cut into. Tr 37.

REASONS FOR GRANTING THE WRIT

First: The decision below conflicts with the decisions of other courts of appeals as to the proper interpretation of 5 USC Sec. 706 governing scope of judicial review of agency action.

The tenth circuit has ruled that "where the determination under 5 USC Sec. 706(2)(E), and the issue of whether or not the determination is 'unsupported by substantial evidence' and where there is 'substantial controversy' as to the 'material facts', the district court is precluded from entering a Fed. R. Civ. P. 56 type of 'summary judgment.'" Nickol v. United States, 501 F2d 1389 (1974) (upheld on petition for rehearing en banc).

In Heber Valley Milk Company v. Butz, 503 F2d 96, 97 (10th Cir. 1974), the Honorable Thomas C. Clark, Associate Justice Retired, sat by designation with Hill and Mc Williams, Circuit Judges. The court said:

> "In Nickol, we held that summary judgment is inappropriate in a judicial review under the Administrative Procedure Act of 1946 of an order and decision of an administrative agency when the issue to be decided is whether the administrative order is supported by substantial evidence, and there is substantial controversy as to the material facts. We indicated in Nickol that it is the duty of the trial court to examine the record as made before the administrative agency, and then to 'find', and to identify, the 'facts' which it deems to be supportive of the agency's order, if such be the trial court's resolution of the matter. The trial judge in Nickol in his judgment and order stated that he had examined the record as made before the administrative agency and that he had 'concluded' that there was evidence to support the agency's decision. But in Nickol we held that such was not enough, and that the trial court must itself make 'a finding of fact or facts as to what is the substantial evidence which supports the agency determination...(and that) (t)he appellate court cannot properly review the district court's action without such findings."

In Hill v. Morton, 525 F2d 327 (10th Cir. 1975, the court said:

> "In a two-sentence 'Judgment' the district court indicated 'consideration of the briefs filed by the parties and the administrative record,

concluded that the action of the Secretary was arbitrary and capricious and ordered the Secretary to pay plaintiff's claim in full. The government now appeals."

* * * *

"Here, the district court concluded only that the agency action was arbitrary and capricious, but offered neither an explanation of the manner in which the conclusion was reached nor a statement of which facts in the administrative record, or the absence thereof, were relied on in reaching its conclusion.

With basis for the district court's disposition of the matter obscure, proper appellate practice is precluded. Therefore the judgment appealed from must be vacated and the matter remanded for further proceedings consistent with the principles announced in Nickol and Heber Valley."

The decision here of the Court of Appeals for the Ninth Circuit, affirming the district court's summary judgment in a case for judicial review, conflicts with Nickol, Heber Valley, and Hill above.

The Nickol court recognized conflict with the decisions of the Court of Appeals for the Ninth Circuit and said, 501 F2d 1389, p. 1390:

"One court has characterized a judicial determination of whether a finding of fact (in an adminis-

trative proceeding) is supported by substantial evidence as 'only a question of law' and therefore 'subject to disposition by summary judgment'. Dredge Corp. v. Penny, 338 F2d 456 (9th Cir.). See also Beane v. Richardson, 457 F2d 758 (9th Cir.); White v. Udall, 404 F2d 334 (9th Cir.); Henrikson v. Udall, 350 F2d 949 (9th Cir.); Todaro v. Pederson, 205 F Supp. 612 (N.D. Ohio 1961), aff'd 305 F2d 377 (6th Cir.); 6 Moore's Federal Practice p. 56.17 (3) at 2472-73 (1974).

"The very purpose however of such judicial review of agency action is to examine the facts in the record. Universal Camera Corp. v. NLRB, 340 U.S. 474 at 484. Thus, it would seem that the prerequisites for a summary judgment under Fed. R. Civ. P. 56 are absent in a review of the administrative record under the circumstances before us." 501 F2d at 1390.

* * * *

"... Thus, we hold that where the determination under 5 USC Sec. 706 (2)(E), and the issue of whether or not the determination is 'unsupported by substantial evidence', and where there is 'substantial controversy' as to the 'material facts', the district court is precluded from entering a Fed. R. Civ. P. 56 type of 'summary judgment'."

The Court of Appeals for the Ninth Circuit observed:

> "...a bald conclusion by the trial judge (that sufficient evidence does or does not exist to support the Secretary's decision that there had or had not been a sufficient discovery) is of no aid to this Court in making its own decision that such sufficient evidence exists,and that the district judge relied upon it." Multiple Use, Inc. v. Rodgers C. B. Morton, 504 F2d 448 (1974).

The Supreme Court said in Universal Camera that a reviewing court should set aside an agency decision when it cannot find that the evidence supporting that decision is substantial, when viewed in the light of the record in its entirety, including the evidence opposed to the agency's view. 340 U.S. at 488. The Supreme Court (Mr. Justice Frankfurter) stressed that reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. p. 490.

The Third Circuit followed Universal Camera and exercised "the conventional judicial function" and concluded that the finding of the Federal Security Administrator establishing a standard of identity for salad dressing was not supported by substantial evidence when the record was considered as a whole. Cream Wipt Food Products Co. v. Federal Security Administrator. 187 F2d 789 (1951).

The Fourth Circuit followed Universal Camera in Litton Dental Products Etc. v. N.L.R.B., 543 F2d 1085, 1087 (Nov. 3, 1976). It concluded that the Board's decision and order were entirely lacking in the substantial support in the evidence that is indispensable to Board action.

The Fifth Circuit discussed the appropriate standard of review in Mueller Brass Co. v. N.L.R.B., 544 F2d 815 (1977) and noted that if, after a full review of the record the court was unable to conclude that the evidence supporting the Board's determinations is substantial, it should deny enforcement. (Citing N.L.R.B. v. Mueller Brass Co., 509 F2d 704, 707 (5th Cir 1975); N.L.R.B. v. O. A. Fuller Super Markets, Inc., 374 F2d 197, 200 (5th Cir. 1967). The Court reversed the Board's decision as not supported by substantial evidence.

In Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, the Supreme Court reversed the Sixth Circuit's decision, which affirmed a district court's summary judgment in favor of the Secretary of Transportation's administrative determination, 309 F Supp 1189 (W.D. Tenn) 432 F2d 1307 (6th Cir.). The Court remanded the case to the district court for "plenary review" of the administrative decision, allowing the court in its discretion to remand the cause to the appropriate agency and official for further proceedings if necessary.

ARGUMENT

First: The Administrative Procedure Act (5 USC Sec. 706) provides for scope of review: "The reviewing court shall" determine whether agency action is "unsupported by substantial evidence" (subsection 3) and "the court shall review the whole record, or such portions thereof as may be cited by any party."

The Senate and House committees explained" "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Senate Doc. No. 248, 78th Cong. 2d Sess. 214, 280 (1946).

The Supreme Court made clear in Universal Camera that it takes literally both the words of the statute and the words of the committee reports (340 U.S. 474). The Administrative Procedure Act applies to contests conducted by the Department of the Interior. U.S. v. Heirs of Stack,A-28157 (1960).

Senator Hruska, of the Senate Judiciary Committee, former Chairman of the Committee on Administrative Practice and Procedure, made clear that Congress intended that the courts should review administrative decisions critically. He said in the February 19, 1974 Congressional Record - Senate S 1911, 1912, that

> "The way the Administrative Procedure Act is meant to be carried out, the administrative law judges are expected to make specific findings as to the evidentiary facts in each case they hear and to frame their ultimate conclusions accordingly. If the case is brought up for judicial review, the reviewing court is not intended to dispose of the case merely by looking for some evidence in the record to support the decision below. The reviewing court should consider whether or not each of the rulings on evidentiary fact is supported by substantial evidence. The courts should not adopt uncritically findinags of ultimate fact made below simply because they are labeled 'findings', when they are really conclusions.
>
> "The reason why it is essential for the judge who hears the evidence to make specific findings of evidentiary fact was pointed out in Saginaw Broadcasting Co. against the Federal Communications Commission. Judge Stephens came right out with the statement that--
>
> "The requirement of findings is far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered to facts and law. This is fully as important in respect to commissions as it is in respect of courts.
>
> "When the trial judge bases his conclusions upon specific evidentiary findings, these furnish to a reviewing court the foundation upon which to base an intelligent review of the decision. And the reviewing court should not shrink from the sometimes

laborious task of examining the record to evaluate the findings made below. The Administrative Procedure Act, section 706 of title 5 of the United States Code, makes it the duty of the reviewing court to review the whole record, or such portions thereof as may be cited by any party, and the take due account of the rule of prejudicial error.

"If the reviewing court will take the trouble to make the critical examination of the administrative record which Congress intended when writing the Administrative Procedure Act, the court should be able to detect instances where bureaucratic policy has been allowed to override the facts which support the citizens' rights. Citizens must look to the courts to protect their constitutional rights and give them meaning. Unless the courts will stand out against instances of bureaucratic injustice, the Constitution becomes only a scrap of paper.

"Our form of government must necessarily make use of administrative agencies, and the course of history has shown many times and in many countries that the inevitable tendency of agencies is to reach out for increasing power, to expand the scope of their authority and the number of their personnel until what President Franklin Roosevelt called the fourth branch of government becomes truly a bureaucracy. And,

more recently, the Senator from Arizona, Senator Goldwater, expressed similar concern about the bureaucracies. Power alters the perspective of the persons who wield it, and particularly where agencies administer large areas of public resources, there is a tendency to create and enlarge a Federal empire which is inside the 50 States, but really independent of them.

"The temptation to consolidate that empire, by dispossessing citizens of property rights lawfully acquired under acts of Congress, is a strong one. To a zealous bureaucrat, the project may look a righteous crusade, while the citizen screams "Confiscation". The task of preserving our kind of country, one where a citizen's constitutional rights are a reality, so that it will not turn into a bureaucracy where those rights have no meaning, calls for the courts to check and correct administrative abuse of power."

Second: The Administrative Procedure Act provides that the reviewing court shall set aside agency action, findings and conclusions found to be "unsupported by substantial evidence". 5 USC §706 (2)(E). Substantial evidence must be more than a scintilla of evidence and more than suspicion or surmise. Lindenau v. Watkins, 73 F Supp 216 (DC NY 1947). It must do more than merely create suspicion of the existence of

the fact or facts to be established. Interstate Motor Freight System v. United States, 243 F Supp 868 (DC Mich. 1965). The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 478, 487, 488 (1951).

Third: The District Court must make findings of fact based on substantial evidence in the record, facts which support agency conclusions and facts which detract from agency conclusions.

The reason for requiring the basic facts of a case to be found are explained in Saginaw Broadcasting Company v. F. C. C, 96 F2d 559, 560, cert. den. 59 S Ct. 72.

Fourth: Neither United States Forestry nor the Department of the Interior had jurisdiction over the subject matter for failure to comply strictly with the conditions for determining title uncertainties under 30 USC §613, upon which the agencies' authority and jurisdiction are made to depend.

An attempt to exercise power without compliance with the provisions of the act as to the manner and circumstances of its exercise is a nullity. 5 USC §558(b). Statutory administrative agencies are governed strictly by the statute from which they derive their existence. N.L.R.B. v. Atlantic Metallic Casket Co., 205 F2d 931 (CA 5 1950).

The Court of Appeals found that the agencies did not comply with procedures for determining title uncertainties under 30 USC §613 and vacated the district court's judgment with respect to mining claims outside the State of Oregon. The court should have found that the agencies' procedure was defective as to the three claims which are on the same deposit. The need for the agency to make a title search before initiating a Public Law 167 proceeding is made apparent by the outcome of this case. A certificate of title is required to accompany the statutory letter which initiates the proceeding. The title certificate of an attorney of the Department is sufficient, if it is based on tract indices of mining claims in the county records. If there are no tract indices, the certificate of title must be prepared by a title or abstract company or title abstractor. 30 USC §613 (a).

The legislative history shows that Congress intended to make a title search mandatory. "... a copy of the notice must be mailed by registered mail to each person shown by a title certificate to have an interest in the lands." U.S. Code, Cong and Admin. News, 84th Congress, 1st Session, 1955, Vol. 2 p. 2485. (Emphasis supplied.)

A "Certificate of non-existence of tract indices" is no substitute for a "certificate of title" under §613(a).

Congress undoubtedly had in mind the protection of bona fide claimants

when it spelled out in the Act the procedures to be followed. On the one hand, it wanted to invalidate fraudulent claims; on the other, it recognized that bona fide claimants would suffer from agency harrassment. The legislative history is recorded as follows:

> "On the other hand, continual interference by Federal agencies in an effort to overcome this difficulty would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." U.S. Code, Cong. and Admin, News, 84th Congress, 1st Session, 1955, Vol. 2, p. 2479.

CONCLUSION

For the foregoing reasons, we pray that this honorable Court issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

July 27, 1977

Respectfully submitted,

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APPENDIX

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINERAL VENTURES, LIMITED, *Appellant*, vs. THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, *Appellee.*	No. 75-3062 MEMORANDUM

[May 3, 1977]

Appeal from the United States District Court
for the District of Oregon

Before: HUFSTEDLER, GOODWIN, and ANDERSON,
Circuit Judges.

Mineral Ventures appeals the district court judgment affirming a decision of the Department of the Interior that the U. S. Forest Service has the right to manage the non-mineral surface resources (timber) overlying certain unpatented mining claims within the Siskiyou National Forest. Surface Resources Act, 30 U.S.C. § 611 *et seq.*

The district court found substantial evidence that no valid discovery of a valuable mineral deposit had been made prior to the effective date of the Act (July 23, 1955). We agree.

When the government seeks to establish its right to manage the surface nonmineral resources overlying a mining claim, it bears the initial burden of establishing a prima facie case of nondiscovery of a valuable mineral deposit. *United States v. Springer,* 491 F.2d 239, 242 (9th Cir.), *cert. denied,* 419 U.S. 834 (1974); *Foster v. Seaton,* 271 F.2d 836, 838 (D.C. Cir.

1959). The burden then shifts to the claimant to establish by a preponderance of the evidence that he made a valid discovery.

The function in the reviewing courts is not to reweigh the evidence, but rather to determine whether Interior's decision is supported by substantial evidence on the record. *Multiple Use, Inc. v. Morton*, 504 F.2d 448, 452 (9th Cir. 1974).

The evidence before the administrative law judge was in conflict. The government witnesses tended to prove that the low-yield, scattered showings of gold were not worth the cost of recovery. The claimant's evidence tended to show that some valuable mineral had been recovered between 1920 and 1940, but this generalized testimony failed to satisfy the trier that there was a discovery under the test of *United States v. Coleman*, 390 U.S. 599 (1968).

The record indicates that a part of the "Enterprise" claim lies within the State of California. The government's notices erroneously described all the challenged mining claims as being within the State of Oregon. While we have no doubt that the Secretary can institute proceedings to extinguish adverse claims to timber and other surface rights on the part of the Enterprise claim within California, he has not done so. The present proceedings cannot extinguish claims not covered by the notices.

The judgment below should be vacated and remanded for the entry of an amended judgment granting the Secretary the relief demanded with reference to claims within the State of Oregon only. We express no opinion upon the validity of the discovery, if any, on the part of the Enterprise claim within California as that issue has not been properly brought before the district court or this court.

Vacated and remanded.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 5-10-77—410

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MINERAL VENTURES, LTD., Plaintiff,	)	Civil No. 74-201
vs.	)	
	)	RECOMMENDATION
THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, Defendant.	)	AND ORDER
	)	July 10, 1975

Plaintiff Mineral Ventures, Ltd. (Mineral Ventures) seeks judicial review of the administrative determination of the Secretary of the Interior (Secretary) that management of its three mining claims, the Swamp claim, Swamp Extension claim, and the Enterprise claim, located on U. S. National Forest Service (Forestry) lands, is subject to the provisions of the Surfaces Resources Act (Act), 30 U.S.C. 612. The Swamp and Swamp Extension claims are located entirely in Oregon. A portion of the Enterprise claim extends some 1,000 feet across the Oregon border into California. Jurisdiction is based on 5 U.S.C. 704. The Secretary has moved for summary judgment under Fed. R. Civ. P. 56(b). Mineral Ventures has moved for judgment on the record.

The Act provides that if the Department of Agriculture (Agriculture) wishes a determination of the surface rights to Forestry-managed lands, it must formally request Interior to publish a notice to mining claimants. The request must describe in detail the lands in which Agriculture is interested. The request must be accompanied by an affidavit affirming that the lands in question have been examined and that no persons were found to be in actual possession

of or engaged in the mining of all or part of such lands. The request must also be accompanied by a certificate setting forth the names of persons disclosed by a tract index to have an unpatented mining claim to such lands. The Act further requires that Agriculture send actual notice of any proceedings under the Act to all mining claimants whose identity is disclosed by the physical examination of the described land or by examination of the tract index.

Agriculture prepared a request for publication of notice to mining claimants which described only lands situated in Josephine County, Oregon. An examination of the described lands was made and an affidavit of examination affirming that no one was in possession of or mining the lands was attached to the request. As no tract index for the area exists, Agriculture prepared an affidavit affirming that fact and attached it to the request. Notice of the agency proceeding was published in a daily newspaper for nine consecutive weeks.

Mineral Ventures' first principal contention is that the Department of the Interior (Interior) lacked jurisdiction over the subject matter of this proceeding due to its failure to comply strictly with each jurisdictional requirement of the Act. Instances of the alleged noncompliances are set out and discussed below.

First, Mineral Ventures contends that the affidavit of examination is

obviously false because the land was in possession of and being worked by the mining claimant. This argument is rejected. The affidavit is valid on its face. The examination of the land was made between April 17 and July 2, 1959, before Mineral Ventures' experts went onto the land to gather evidence of a valid mineral discovery.

Second, Mineral Ventures contends that the record contains no certificate of title. It is correct. However, as the Act only requires a certificate of title to be made from examination of a tract index, the nonexistence of a tract index excuses compliance with the provision. This court has previously held that when literal compliance with the above provisions of the Act is impossible, Interior does not lose jurisdiction of the surface resources proceedings. Converse v. Udall, 262 F. Supp. 583, 592 (1966). The mining claimant was completely informed of the proceeding because it filed a timely verified statement.

Mineral Ventures' second principal contention is that even if Interior had jurisdiction of the proceeding, it did not have jurisdiction over the California portion of the Enterprise claim because the California land was not described in the published notice. It is true that an entire claim must be before Interior in a surface resources proceeding and found to be lacking in a valid mineral discovery before Forestry can assume control over any part of the claim.

I find that the entire Enterprise claim was properly before Interior and that Interior had jurisdiction to determine the rights to the entire claim.

First, Mineral Ventures is at least partly responsible for the fact that only the Oregon portion of the Enterprise claim was ostensibly before Interior. The Act requires the mining claimant to ensure that its entire claims are before the agency by filing a statement verifying the extent of its unpatented mining claims. It may be impossible in a given case for Agriculture to know the extent of a claim due to the nonexistence of tract indexes.

Second, the record suggests that Mineral Ventures consented to Interior's adjudication of the entire Enterprise claim. At the October 24, 1972, hearing before the administrative law judge, counsel for Mineral Ventures expressed his intention and desire to present evidence as to the California as well as the Oregon portions of the Enterprise claim. He stated that he did not realize that the notice to mining claimants was limited to lands situated in Oregon. There is no indication that Mineral Ventures was misled into believing that it would not have to defend its entire Enterprise claim at the hearing. Indeed, Mineral Ventures attempted to introduce into evidence an exhibit relating only to the California portion.

Third, the administrative law judge reserved ruling on the admissibility of evidence as to the California land. While the testimony of its experts suggests that Mineral Ventures' interests were

primarily in the Oregon portion of the claim, the mining claimant was not prohibited from introducing evidence as to the California portion. The mining engineer who testified for the government did not restrict his observations or testimony to the Oregon portion. He testified without objection by plaintiff that the California portion had been extensively mined. Because the judge's decision dealt with the entire claim, he must have admitted Mineral Ventures' exhibit relating to the California portion of the claim.

Mineral Ventures' third principal contention is that the Secretary's decision is incorrect on the merits.

When the government contests a mining claim under the Act, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that he or his predecessors had made a valid mineral discovery before the effective date of the Act, July 23, 1955. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The scope of review granted to this court is extremely limited. This court only determines whether the Secretary's decision that a mining claimant has not made a valid mineral discovery on his unpatented mining claim is arbitrary or capricious or unsupportable by substantial evidence, considering the record as a whole. Sanford v. United States, 399 F.2d 693 (9th Cir. 1968).

The government sustained its burden of proof. It introduced the testimony of Mr. Colver F. Anderson, a mining engineer with many years experience in public and private work as a mine sampler and assayer. Mr. Anderson took representative samples on the Enterprise claim from areas indicated to him by the president of Mineral Ventures, Dr. Bernard C. Gabrielsen. A fire assay of one sample revealed a gold value of $.54 per cubic yard at contemporary prices or about $.09 per cubic yard at 1955 prices. Mr. Anderson's calculation of another sample revealed $.18 per cubic yard at contemporary prices. Both samples were taken from near bedrock, under approximately twelve feet of unproductive overlay. Mr. Anderson testified that removal of the overlay would cost $.40 to $.50 per cubic yard. He found no significant gold on the Swamp or Swamp Extension claims. He concluded that there was insufficient value in the three claims to justify further efforts to develop a mine.

Mineral Ventures introduced the testimony of Dr. Gabrielsen, a civil engineer, who went onto the claims for the first time in 1959. He conceded that he "didn't have anything in 1955." He testified that removal of the overlay by bulldozer would cost about $.50 per cubic yard today or about $.30 per cubic yard in 1955. He said hydraulic operations would be less expensive but offered no evidence that it would be so on these particular claims.

Mineral Ventures also introduced the testimony of Dr. Christopher Buckley,

an economic geologist, who did not come onto the claims until 1966. Based on one sampling, he testified that the Enterprise contained a 30,000 square feet section with an average gold value of $6.00 per cubic yard. He did not conduct exploratory drillings to determine if the entire gravel deposit was as rich as his claimed $6.00 per cubic yard. Based on samples taken by a miner, Bob Watson, Dr. Buckley calculated that from $1.80 to $3.60 per cubic yard could be recovered on the Enterprise claim. Dr. Buckley admitted that he was in no position to say how much it would cost to remove the nonproductive overlay.

There is substantial evidence that the cost of removing the gold would far exceed its value.

Dr. Gabrielsen testified that his grandfather supported himself on the claims from 1923 to 1942, but there are no records showing the amount of gold produced on the claims during this period. There is evidence that the grandfather also operated a sawmill on the claims.

The Secretary determined that Mineral Ventures did not prove by a preponderance of the evidence that there was a discovery of a valuable mineral deposit on the three claims as of July 23, 1955. Moreover, it is not clearly established that the samples which Mineral Ventures introduced were taken from workings exposed prior to the effective date of the Act. Although Mineral Ventures may be justified in conducting further exploration or research, there is

substantial evidence that a prudent man would not be justified in initiating actual mining operations. See Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

Mineral Ventures' final contention is that the administrative finding that the three unpatented mining claims are subject to the Act constitutes a taking of private property without compensation in violation of the fifth amendment. This argument is without merit. See Cameron v. United States, 252 U.S. 450 (1920).

Defendant's motion should be granted.

Plaintiff's motion should be denied.

Dated this 9 day of July 1975.

/s/ George E. Juba
United States Magistrate

After review of the file and record in this case, I approve the above.

IT IS ORDERED:

1. Defendant's motion for summary judgment is granted.

2. Plaintiff's motion for judgment on the record is denied.

Dated this 10 day of July 1975.

/s/ Robert C. Belloni
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MINERAL VENTURES, LTD., Plaintiff,	)	Civil No. 74-201
v.	)	
THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, Defendant.	)	JUDGMENT

Based on the record,

IT IS ORDERED AND ADJUDGED that the action is dismissed.

Dated: July 10, 1975.

/s/ Robert M. Christ
Clerk of Court

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES
v.
MINERAL VENTURES, LTD.

IBLA 73-299 Decided December 12, 1973

Appeal from decision of Administrative Law Judge Dean F. Ratzman (Contest No. OR-09999-E) holding appellant's mining claims subject to section 4 of the Surface Resources Act of July 23, 1955.

Affirmed as modified.

Mining Claims: Surface Uses--
Surface Resources Act: Generally

In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine whether a mining claim is subject to the limitations and restrictions of section 4 of the Act, the issue is whether or not there is now disclosed within the boundaries of each claim valuable minerals of sufficient quantity, quality, and worth to constitute a discovery, and whether the discovery was made prior to the effective date of the Act.

Mining Claims: Discovery: Generally

To verify whether a discovery of a

valuable mineral deposit has been made, a government mineral engineer need not explore or sample beyond those areas which have been exposed by the claimant; he is not required to do the discovery work for the claimant.

Mining Claims: Discovery: Generally--
Mining Claims: Surface Uses--
Surface Resources Act: Generally

Testimony by a government mineral engineer that he examined the mining claims and the workings thereon and sampled the areas recommended by the claimant but found no evidence of a valuable mineral deposit which would have in the past or present justified a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a valuable mine, is sufficient to establish a prima facie case of absence of a discovery so as to subject a mining claim to the limitations imposed by section 4 of the Act of July 23, 1955.

Mining Claims: Discovery: Generally

Under the mining laws one discovery anywhere on a claim is sufficient to constitute a discovery as to the whole claim.

Mining Claims: Discovery--Surface
Resources Act: Hearings

A hearing under section 5 of the

Surface Resources Act of July 23, 1955, directed only to a portion of a claim is insufficient to establish an absence of a discovery as to the whole claim as the locator may still have a valuable mineral deposit on that portion of the claim not challenged by the Government.

Mining Claims: Surface Uses--Surface Resources Act: Verified Statement

Where a verified statement filed pursuant to the Surface Resources Act of July 23, 1955, fails to set forth, as required by section 5(a)(3) of the Act, all of the sections of public land which are embraced within each of the claimant's mining claims, the statement is defective as to an inadequately described claim and said claim is subject to the limitations and restrictions of the Act.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellant; Albert R. Wall, Esq., Office of the General Counsel, United States Department of Agriculture, for appellee.

OPINION BY MR. RITVO

Mineral Ventures, Ltd., has appealed from an adverse decision of an Administrative Law Judge dated February 8, 1973. The Judge declared appellant's placer gold mining claims subject to the limitations and restrictions of section 4 of the Surface Resources Act of July 23, 1955,

30 U.S.C. § 612 (1970).

At the request of the Forest Service, United States Department of Agriculture, a proceeding pursuant to section 5 of the above Act was initiated. The purpose of the proceeding was to determine the right of the United States to control and use the surface resources on three placer mining claims so long as the claims remained unpatented.

A hearing was held in Portland, Oregon, on October 24, 1972, to determine whether a discovery of a valuable mineral deposit had been made within the limits of any of the claims. The three claims in issue are the Enterprise, Swamp, and Extension of Swamp, located in sec. 13, T. 41 S., R. 7 W., Willamette Meridian, Althouse Mining District, Josephine County, Oregon. A portion of the Enterprise claim extends approximately 1,000 feet across the Oregon border into California. All the proceedings preliminary to the hearing were directed solely to the Oregon portion of the Enterprise. The problems arising from this restriction are discussed below.

During the hearing the Government's sole witness, Clover F. Anderson, a Forest Service mining engineer, testified that he had taken samples from the subject claims and that the gold content in the samples was very low. (Tr. 23, 24.) He further testified that the cost of exploiting the gold from these claims would make a mining operation unprofitable. (Tr. 25, 49, 50.) In his view, a valuable mineral deposit had not been discovered on the claims prior to July 23, 1955, and a discovery did not presently exist, even given today's gold prices. (Tr. 26, 50.)

The mining claimant presented almost no probative evidence regarding a discovery on the Swamp or Extension of Swamp claims. It did actively assert that a discovery presently existed, and did exist prior to July 23, 1955, on the Enterprise claim. Its witnesses testified that gold, in a sufficient quantity, was present on the claims justifying further expenditure of time and moneys for development of the properties with a reasonable prospect of success. (Tr. 92, 98, 116.)

The Administrative Law Judge reached the conclusion that no discovery of a valuable mineral deposit within the limits of any of the claims in issue had been demonstrated. Consequently, he declared the three claims subject to the restrictions and limitations contained in section 4 of the Act of July 23, 1955, supra.

On appeal, the appellant presses three primary arguments:

> 1. Mr. Anderson, sole witness for the Government, anchored his opinion as to lack of discovery upon the erroneous assumption that the Claimant must prove that the mine was profitable on July 23, 1955.
>
> 2. One discovery on a claim is sufficient. Thus evidence of lack of discovery on a portion of the claim is insufficient to establish a prima facie case as to that claim. The Enterprise is part in Oregon and part in California.

> 3. The Government alleged, but offered no evidence to prove, that the Office of Hearings and Appeals had jurisdiction to try this case under the Surface Resources Act, 30 U.S.C. § 613.

Appellant first argues that the Government's witness based his opinion regarding lack of a discovery on an erroneous profitability test: i.e., that the claimant must prove that the mine was, in fact, profitable. Appellant points out that proof of lack of a discovery cannot be based solely upon a showing that a mine was or is not, in fact, operated profitably. He cites Converse v. Udall, 399 F.2d 616, 622 (9th Cir. 1968), cert. den., 393 U.S. 1025 (1969), wherein the Court stated:

> ***But this does not mean that the locator must prove that he will in fact develop a profitable mine.

Having reviewed the complete record, we cannot agree with appellant's contention that Anderson relied exclusively on a past and present profitability test in determining whether a discovery existed. Anderson's references to profitability were simply comments respecting the potential economic viability of the claims. The witness's total evaluation of the quantity of gold on the claims and the cost of removing and processing the material indicated that a mining venture would not be profitable. He found no exposure of a mineral deposit on any of the claims which would have, in the past or present, justified a person of ordinary prudence in the

further expenditure of his time and means in an effort to develop a valuable mine.

It was proper for Anderson to consider the economics of the situation when making his evaluation regarding discovery on the claims. In Chrisman v. Miller, 197 U.S. 313, 322 (1905), the Supreme Court stated that in order to satisfy the prudent man test of Castle v. Womble, 19 L.D. 455, 457 (1894);

> "***The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral."
> ***

A similar test is presented in the lines immediately preceding appellant's quotation from Converse, supra, p. 622:

> ***But the marketability test does not permit the fact finder, even in the case of a showing of gold, to consider, somewhat more extensively then heretofore, the economics of the situation. Perhaps we could phrase the test this way: When the claimed discovery is of a lode or vein bearing one or more of the metals listed in 30 U.S.C. § 23, the fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and transportation as bearing on whether a

> person of ordinary prudence would be justified in the further expenditure of his labor and means. But this does not mean that the locator must prove that he will in fact develop a profitable mine.

Given the above tests in Chrisman and Converse, supra, Anderson's analysis of profitability and other economic criteria was a correct basis for a determination of lack of discovery. The Judge properly relied on this testimony in his decision on the issue of discovery. In any event, the crucial point is not what the witness' concept of "discovery" was, but whether the Judge understood and employed, the proper standard. It is clear that he did not require appellant to prove profitability in fact but only adduce sufficient evidence to demonstrate that a profitable venture might reasonably be expected to result. This is the proper test. United States v. Harper, 8 IBLA 357, 365-367 (1972).

We have reviewed the record and we find ourselves in agreement with the Judge's determination of lack of discovery with respect to the Swamp and Extension of Swamp claims. For the reasons set out below, we do not consider the Enterprise claim along with the above two claims.

As to the Enterprise claim, we move on to appellant's second argument that the evidence of lack of discovery on a portion of the claim is insufficient to establish a prima facie case as to the whole claim.

In a case of this nature, the Government has by practice assumed the burden of establishing a prima facie case that there has not been a discovery of a valuable mineral deposit within the mining claim. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Alarco, 9 IBLA 1, 3 (1973).

Anderson testified that he examined both the California and Oregon sections of the Enterprise claim. He noted that the southern portion of the claim extending into California had been thoroughly mined. (Tr. 25.) He took samples from areas within Oregon recommended by the appellant. (Tr. 45, 50.) He was not directed to any area in the California portion.

It is well established that a government mineral examiner need not explore or sample beyond those areas which have been exposed by the claimant. The examiner is simply verifying whether a discovery has been made; he is not required to perform the discovery work for the claimant. United States v. Wells, 11 IBLA 253, 263 (1973); United States v. Kelty, 11 IBLA 38, 42 (1973); United States v. Grigg, 8 IBLA 331, 343, 79 I.D. 682 (1972). Anderson was not required to take samples from the unexposed areas on the California portion of the claim.

Anderson's testimony that he examined the mining claim and workings thereon and sampled the areas recommended by appellant but found no evidence of a valuable mineral deposit was sufficient to establish a prima facie case by the Government

that there had not been a discovery as to the whole claim. United States v. Jones, 2 IBLA 140, 148 (1971). Thereupon, the contestee was required to prove by a preponderance of the evidence that a discovery did exist on the claim. United States v. Nichol, 9 IBLA 117, 122 (1973). The appellant failed to meet its burden of proving a discovery existed on the Enterprise claim. A mining claim is properly declared invalid where the Government establishes a prima facie case of lack of discovery and the claimant does not show by a preponderance of evidence that the claim is valid. United States v. Taylor, 11 IBLA 119, 123 (1973); United States v. Mellos, 10 IBLA 261, 267 (1973); United States v. Dotson, 10 IBLA 146, 147 (1973).

There is, however, another aspect to appellant's contention that goes beyond the issue of discovery. Although appellant couches its argument in terms of an inadequate prima facie case, the real issue is the sufficiency of the proceedings leading to the hearing. The thrust of appellant's contention is that the preliminary proceedings were deficient as to the Enterprise claim, leaving the Department without jurisdiction to hold a hearing covering it.

As noted above, the Enterprise claim lies in both Oregon and California. The notice of publication and appellant's verified statement, both required by § 5 of the Act[1/], only described land situated within Oregon.

1/ Section 5 of the Act reads in pertinent part:

"(a) The head of a Federal department

(Footnote 1 continued)

or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the Office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument. . . .

* * * * * * *

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim --

(1) the date of location;

(2) the book and page of recordation of the notice or certificate of location;

(Footnote 1 continued)

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 4 of this Act as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 4 of this Act as to hereafter located unpatented mining claims."

Section 5 requires a mining claimant to set forth all of the sections of public land in which his claim lies. This the appellant admittedly failed to do. Its neglect has led directly to the difficulty in which we find ourselves. If the verified statement had been known to be defective when it was filed and had not been corrected within the 150-day period, it would have been rejected and then there would have been no further proceedings.2/

The statement as filed is not defective on its face, since a claim could exist limited to the sections it described. But at the hearing the mining claimant stated and still insists that its claim covers other lands. It also asserts that the procedure as to the Enterprise is invalid. Yet the reason the procedure is invalid, if so it be, is because Mineral Ventures, Ltd. (or its predecessors) filed a defective verified statement.

To decide the effect of a section 5 proceeding involving only a part of a mining claim, we turn first to an examination of the statute.

2/ While a verified statement may be corrected after the 150 days have elapsed, it may not be amended to assert rights in lands other than those identified prior to the expiration of that period. Weeds Point Mining Company, A-30799 (November 2, 1962); see Ted R. Wagner, 69 I.D. 186 (1962).

The steps leading up to a hearing under section 5 begin with a decision by the head of a federal department or agency who has responsibility for administering surface resources of lands belonging to the United States that he believes that a determination is desirable to ascertain who controls the surface rights to certain of such lands. The lands are then examined to discover whether anyone is in actual possession or engaged in working them. The agency head must also have a search made of "tract indexes" in the proper county office of record, if such there be. The agency or department head then files a request with the Secretary of the Interior for publication of a notice for determination of surface rights describing the section or sections of public lands embracing the lands covered by the request.

The Secretary of the Interior then directs publication of the notice describing the lands covered by the request. The notice is directed to any person claiming or asserting rights to such lands by virtue of an unpatented mining claim. So far the proceedings are directed solely to the lands covered by the request.

In response to the notice a mining claimant desiring to assert rights to the surface resources in any of such lands must file a verified statement. The verified statement must set forth certain information as to the unpatented mining claim. For our purpose, one item is particularly important. He must set forth "the section or sections of the public land surveys which embrace such mining claims." Sec. 5(a)(3), 30 U.S.C. § 613 (1970).

In other words, a mining claimant must describe all of the sections of public land in which his claim lies.

Here for the first time lands not covered by the "determination" request are brought into the proceedings.

Up to this point the on-the-ground and record examinations have been directed to the land with which the administering agency is concerned. In the verified statement the mining claimant has an opportunity and is required to identify his mining claim and all the sections of public land it covers. The statute then speaks in terms of a "mining claim."

As the Administrative Law Judge pointed out, the verified statement filed on September 21, 1960, by the then owners of the Enterprise[3/], stated that the three mining claims, including the Enterprise, were located in Sec. 13, T. 41 S., R. 7 W., Willamette Meridian, Oregon. It made no reference to land in California.

In August of 1970, appellant submitted to the Forest Service a copy of an unrecorded quitclaim deed describing and conveying only lands in Oregon. Although the deed does not name any mining claims, the description covers the portion of the Enterprise claim in Oregon. There is no indication in the record whether another

3/ These owners were the heirs of one Harry Lee Akerill. The appellant is a corporation whose president is a grandson of Akerill and whose stockholders, for the most part, are members of the family. The

deed conveyed the California portion of the Enterprise.

At the opening of the hearing appellant's attorney asserted that the Enterprise extended into California (Tr.8), but offered nothing to show how appellant had acquired title to the California portion. Appellant calls attention to a letter dated March 11, 1966, from its attorney to Clover F. Anderson, the Forest Service mineral examiner who testified at the hearing, which states that the claims were partly in California and partly in Oregon. However, in its answer to the complaint, appellant stated that the Enterprise, and the two other claims were situated in sec. 13, T. 41 S., R. 7 W., W.M., Joseph [sic] County, Oregon. No mention was made of California.

The difficulties surfaced at the beginning of the hearing. When appellant offered Exhibit M, the Government objected on the ground that it referred to California. (Tr. 8.) The following colloquy then occurred:

> MR. WALL: B, C, E, F, G, H, I, and N, but M is from California and not before the Court today, the California property.
>
> MR. MURRAY: We don't understand that this is the situation, that we are going to divide the claims

(Footnote 3/ continued)
corporation is the successor in interest to the mining claimants who filed the verified statement. (Tr. 56.)

in two. The California line goes right through the claims and according to the notice we understood the entire claim would be tried, whether they are in California or Oregon. So, this certainly will make a confusing situation if we have two hearings. Of course, we would abide by whatever you desire and just limit our testimony to grounds that are in the State of Oregon and ask that those parts of the claims based on counsel statement, which are not in issue in California be dismissed and the proceedings be dismissed as to those parts of the claims in California, based upon the statement made by the Government.

THE COURT: 'Course I received very little information in the transmittal that comes from the Bureau of Land Management and at present there is no map or graph of the claim in the file transmitted to the hearings division. I note that the transmittal of proceedings for hearings refers to No. -09999 -E and land involved being in the County of Josephine, Oregon and the notices which have been issued state Enterprise Placer, Swamp, Extension of Swamp Mining Claim located in Section 13, Josephine County, Oregon.

Mr. Murray, you are indicating that one or more of those claims runs from Josephine County down into California?

MR. MURRAY: The Enterprise Claim is partially in Oregon, partially in California.

I didn't realize that the notice had specifically specified Oregon, I think probably counsel is right that the only issue that can be tried now are the lands in Oregon and therefore we would have to exclude in this hearing the part of the Enterprise Claim which extends into California.

THE COURT: Well, I would say that the Government would have the right to take that position. I'm not sure that that's a fortunate thing with respect to the proposition that has been discussed, mainly the question of two hearings with perhaps duplicated testimony but----

* * * * * * * *

THE COURT: *** I'm going to examine the transmittal from -- I note that the transmittal letter from the United States Forest Service to Bureau of Land Management, dated September 11, 1970, also restricts the request for a hearing to the claims within the State of Oregon and once more I would like to indicate that until I came to this hearing today, I had no idea that the claims extended down into California. I don't believe there is anything in the file which has been furnished to me which would have cast some light on this matter.

MR. WALL: The verified statement is addressed to the Oregon property only.

THE COURT: Well, Mr. Wall, you regard it as a practical and economical matter to break this up and have two hearings if that's what the agency desires?

MR. WALL: Well, the verified statements filed with the Court are only for the Oregon property.

THE COURT: Oh, I see.

MR. WALL: The claimant was responsible for that.

THE COURT: Off the record.

(OFF THE RECORD)

THE COURT: I will allow the parties to preserve their respective positions concerning the status of the portion of the claim which is in California taking into account the statement which Mr. Wall has just made, mainly that the verified statement in this matter also seems to cover only claims said to be situated in the County of Josephine, State of Oregon.

(TR. 8, 9, 10 and 11).

We cannot determine from the transcript or the Judge's decision whether either party offered all the evidence it wanted to concerning the California land. There is some testimony commenting on its having been extensively mined, but such evidence was apparently incidental. The Judge commented that the Government probably could not attack a claim piecemeal but found the Government

had acted in a reasonable and proper fashion. He then found the whole of the Enterprise lacking in a discovery.

The Judge did not restrict his findings to the Oregon portion of the Enterprise. Indeed, if he had, his finding would have been ineffectual. While section 5 of the Act does not explicitly state that the whole claim must be challenged at the hearing, this requirement is a natural outgrowth of the test utilized in determining whether a mining area is subject to the limitations and restrictions of section 4 of the Act, viz., whether a discovery of a valuable mineral deposit has been made within the limits of the claim.

Under the mining laws one discovery anywhere on a claim is sufficient to constitute a discovery as to the whole claim. United States v. McCall, 7 IBLA 21, 26 (1972); Ferrell v. Hoge, 29 L.D. 12, 15 (1899). The pertinent regulation 43 CFR 3842.1-1 reads:

> But one discovery of a mineral is required to support a placer location, whether it be of 20 acres by an individual or 160 acres or less by an association of persons.

Inasmuch as one discovery anywhere on a claim is sufficient to constitute a discovery under the mining laws, a hearing directed to a portion of a claim is insufficient to establish an absence of a discovery as to the whole claim. This follows from the fact that the locator

may still have a valuable mineral deposit on that portion of the claim that was not challenged by the Government.

The Board does not mean to suggest that the Government, being required to challenge the whole claim, must then assume control over the total area should it prevail in its challenge. The Government may choose to exercise control over whatever portion it deems necessary in the public interest. What is required is that the claim as a whole must be involved in the hearing and be found to be lacking in a discovery before the Government can assume control over any part of the claim.

Although the Government may have failed to properly challenge the entire Enterprise claim at the hearing, we are of the opinion that the appellant's predecessors initiated the problem by submitting an incomplete description of the Enterprise claim in their verified statements, and the appellant compounded it by its own actions, i.e., its deed and its answer. The record now before us establishes that the verified statement was defective and should have been rejected, if all the facts had been known. We now have the pertinent facts. Accordingly, we find the verified statement defective as to the Enterprise claim and reject it. Therefore, we find that, as to this claim, Mineral Ventures Ltd. has waived its rights as provided in sec. 5. See n. 1. The Judge's decision is modified to make this the basis for finding that the Enterprise claim is subject to the limitations of sec. 4.

The principal effect of such waiver is the limitation prior to patent as to management and disposition of vegetative surface resources. Appellant may proceed to develop its claim, and it remains entitled to all subsurface rights it had prior to the proceedings. It is also entitled to those surface resources reasonably necessary for conducting its mining operations. United States v. Trussel, 7 IBLA 225, 228 (1972); Arthur L. Rankin, 73 I.D. 305, 311 (1966).[4/] Should patent subsequently issue to appellant for the claims in issue, the reservations, limitations and restrictions imposed by the Act in favor of the United States would cease to exist. 30 U.S.C. § 615 (1970).

Appellant's third argument deals with defects of a technical nature relating to Government Exhibit 13, "Affidavit of Examination," Exhibit 14, "Notice of Publication," and Exhibit 15, "Certificate of Non-Existence of Tract Indexes." It argues that Government errors with respect to these items caused the Office of Hearings and Appeals to lose jurisdiction to adjudicate all of the claims under the Surface Resources Act, 30 U.S.C. § 613 (1970. The Judge denied appellant's request for dismissal

4/ These constraints are equally applicable to the Swamp and Extension of Swamp claims. The Administrative Law Judge did not hold these claims void. He merely held the limitations of section 4 of the Act applied. Appellant still has the claims, can work them, and can apply for a patent.

of the proceeding based upon these jurisdictional grounds.

With respect to Exhibit 15, appellant argues that sec. 613 of the Act requires that a certificate of title be supplied by the Government. Appellant argues that tender of a certificate of nonexistence of tract indexes does not meet the requirements of the section. In the District Court opinion in Converse v. Udall, 262 F. Supp. 583, 592 (D.C. Or. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. den. 393 U.S. 1025 (1969), the Court disposed of an identical argument and stated:

> No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct, as the defendant could not comply with the literal wording of the statute due to the fact that there were no tract indexes of the land in question maintained in the records of Linn and Crook Counties. Because of this fact, defendant instead submitted certificates of the nonexistence of the tract indexes. Obviously, compliance was impossible and the point does not go to the merits.

We have already considered the consequences of the fact that Exhibit 14, the notice of publication, did not describe all the land in the Enterprise claim. As noted above, such description is not required.

The notice of publication and the affidavit of examination are required by 30 U.S.C. § 613 (1970), in order to assure that the proper parties are given notice of the Government's action. Appellant was completely informed of the proceeding against its claims. There is no indication that the appellant was in any way prejudiced by any of the alleged deficiencies in these two exhibits. The Judge stated in his decision, p. 2:

> There is no indication that any deficiencies which may exist in these areas have been prejudicial to the interests of Mineral Ventures, Ltd. (the only mining claimant in this proceeding), or have affected that corporation's opportunity to be represented and heard in this matter. In fact, a hearing originally scheduled for January, 1972, was canceled after requests of the mining claimant's attorney, who advised that he required a longer period for preparation. He requested a hearing for September, 1972. The hearing was held on October 24, 1972.

In the past, this Board has held that technical deficiencies will not defeat the Government's case where there is no showing that the claimant was in any way misled, confused or prejudiced by the errors. Mrs. Mildred Carnahan, 10 IBLA 150, 156 (1973), United States v. Stewart, 1 IBLA 161, 165 (1970); see also the D.C. opinion, Converse v. Udall, supra, p. 592. After reviewing the record, we find that the deficiencies, if any there were, in no way prejudiced the appellant.

Accordingly, the Board finds itself in full agreement with the Judge's ruling on this matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed as modified.

/s/ Martin Ritvo
Martin Ritvo, Member

We concur:

/s/ Joan B. Thompson
Joan B. Thompson, Member

/s/ Frederick Fishman
Frederick Fishman, Member

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
Room W-2426, 2800 Cottage Way
Sacramento, California 95825

February 8, 1973

DECISION

United States of America	:	Contest No. OR-09999-E
	:	(P.L. 167), Involving the
v.	:	Enterprise Placer, Swamp,
	:	Extension of Swamp Mining
Mineral Ventures, Ltd.,	:	Claims, located in Sec. 13,
	:	T. 41 S., R. 7 W., W.M.,
Mining Claimant	:	Josephine County, Oregon

SURFACE RIGHTS RESTRICTED

Upon the recommendation of the Forest Service, United States Department of Agriculture, this proceeding was initiated pursuant to Section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1970), to determine the right to control and use of the land surface of three placer mining claims. A hearing as provided for by Section 5(c) of said Act was held at Portland, Oregon, in October, 1972 on the charge that a discovery of a valuable mineral deposit has not been made within the limits of any of the designated unpatented claims. If the mining claimant can show with respect to a given claim that on the effective date of the above-cited Act (July 23, 1955) there was such a discovery, and that it has remained valid, the restrictions and limitations of the Act will not be applicable to that claim.

QUESTIONS RELATING TO JURISDICTION

The mining claimant's attorney points out

that there has been no publication under the Surface Resources Act as to that portion of the Enterprise claim which extends 1000 feet across the Oregon line into California. He contends that the Government "cannot try a mining claim in parts, piecemeal," and asserts that since the whole Enterprise claim was not challenged, the Office of Hearings and Appeals lacks jurisdiction in this proceeding. In some circumstances this position might be well taken. However, in this case the Government appears to have proceeded in a reasonable and proper fashion, taking into account the information furnished by the mining claimant's attorney. The case file contains a memorandum dated August 13, 1970, from the Branch Chief, Minerals and Geology of the Forest Service, which is a record of an August 11, 1970 meeting between that official and the mining claimant's attorney. At that time the latter advised the Forest Service that Mineral Ventures, Ltd., an Oregon corporation, owned the claims which are involved in this case, and furnished the content of the 1963 quitclaim deed by which the former owners, eight individuals, released their interests to the corporation. That deed covers only real estate "situate in the Althouse Mining District, Josephine County, State of Oregon." Thus predecessors in title of Mineral Ventures split the Enterprise claim ten years ago. In all probability there was no reason to transfer the portion in California, since the evidence from both sides in this case shows that it has been mined out.

The mining claimant also has raised questions of a technical nature relating

to notices to be delivered or mailed to persons in possession or engaged in the working of lands, and to persons who are identified in title certificates, abstract company certificates, etc. In addition, the Forest Service's title search is said to have been inadequate. There is no indication that any deficiencies which may exist in these areas have been prejudicial to the interests of Mineral Ventures, Ltd. (the only mining claimant in this proceeding), or have affected that corporation's opportunity to be represented and heard in this matter. In fact a hearing originally scheduled for January 1972 was cancelled at the request of the mining claimant's attorney, who advised that he required a longer period for preparation. He requested a hearing date in September 1972. The hearing was held on October 24, 1972.

The requests for dismissal of this proceeding which are based upon jurisdictional grounds are denied.

THE EVIDENCE

Mr. Colver F. Anderson, a Forest Service mining engineer, was the Government's only witness. Following completion of his graduate work in geology and mining engineering he obtained a position as an assayer and sampler in 1937. Tr. 16. For the next five years he continued in assaying work or as an employee at mills which were processing minerals. After World War II he worked for ten years for private mining concerns as a mill helper, metallurgist, geologist, engineer and chief engineer. Tr. 17. He has been

employed by the Forest Service to examine and evaluate mining claims since 1956 and is registered as a mining engineer in the State of Oregon. Tr. 18.

Mr. Anderson stated that the Mineral Ventures claims are located on Green's Creek almost 20 miles south of Cave Junction, Oregon. In his opinion they are situated in glacier gravels which have piled up along the creek. Tr. 19. He was on the claims in 1963, 1965, 1966, 1970, and 1972.

Dr. Gabrielson, the President of the contestee corporation, accompanied Mr. Anderson on his 1963 examination, and indicated that ground under the old Akerill cabin contained gold in sufficient quantity to make a paying mine. Tr. 19. Mr. Anderson took one fifteen cubic foot sample from the lower eighteen feet of the thirty foot gravel bank at that point on the Enterprise claim, and a second sample "measured from bedrock up just a yard." Tr. 22. He cut the samples after the occurrence of a major slide in 1964. The slide destroyed most of the evidence of earlier mining activities, but "sluiced the creek out clean" and left the bank where he took the samples "sitting up there as pretty as you please." Tr. 40-42. The appearance of the bank in 1965 had not changed appreciably from when he had first seen it in 1963. Tr. 19.

The gold recovery from the first sample was 18 cents per cubic yard, and from the second it was 54 cents per cubic yard. These samples were taken from "the best place that they [representatives of the

contestee] had found." Tr. 45, 50. All of the gold found by Mr. Anderson was very rough lode gold, not a placer type gold. Tr. 34. He also panned at many locations up and down the creek, obtaining minor colors at some points and a "few more impressive colors" near an old cabin on one of the Swamp claims. Tr. 21. From the available evidence, he concluded that the last described gold had come from a small vein on a nearby tributary stream. Tr. 21.

On the Swamp and Extension of Swamp claims he found that there had been no mining work in recent years. He took a sample on the Swamp in an overgrown area which had been mined many years ago. It was obtained from weathered material which apparently came from the hillside. The gold recovery from this sample was approximately 8 cents per cubic yard. The "one real old time pit" on the Swamp claim is the only indication of any serious mining work on the Swamp or the Extension of the Swamp.

On the southerly portion of the Enterprise claim, near the Oregon border and extending into California for approximately 1000 feet, Mr. Anderson discovered "plenty of evidence" that the area had been thoroughly mined. Tr. 25. Extensive boulder piles exist along the sides of the stream. Tr. 44.

Mr. Anderson has concluded that the cost of removing earth overburden and boulders, and of processing the material which is within two or three yards of bedrock would be prohibitive. In his view a

valuable mineral deposit had not been discovered on the claims prior to July 23, 1955. He also stated that such a discovery does not exist even at the price paid today for gold. Tr. 26. He estimated that it would cost several dollars a yard to handle some of the ground, and added:

> "You can take an isolated yard here and there all right and get a good sample of it, but it's certainly not any production sample." Tr. 25.

He also testified that there was a very strong possibility that the easiest gold had been mined out, and explained some of the difficulties facing a miner as follows:

> "The complexity of the glacial ground with heavy boulders and big boulders mixed with the other gravel materials, these are all angular boulders, they are not water rounded boulders, make it very hard to mine a yard of gravel economically. The depth of ground above the best paying gravel has to be handled and this raises the cost per yard and all together this makes too much burden in getting profit out of the operation." Tr. 49.

Dr. Gabrielson, the mining claimant's President, is a civil engineer who received a Ph. D. in that field in 1966. He teaches civil engineering at California State University at San Jose, and has been

a professor at Stanford University. He has an interest in several concerns which have mineral holdings or are engaged in mineral exploration and development work. Tr. 55. His grandfather acquired the contested claims in 1923 and 1924. From the time of acquisition until 1942, his grandfather was engaged in some mining activity on the property.

Beginning in 1942, mining on the claims could not proceed due to the issuance of a Government order restricting such work. When the order was lifted, Mr. Akerill (Dr. Gabrielson's grandfather) was about 73 years old. He died in 1950 at 76 or 77. Tr. 57. In 1951 Dr. Gabrielson assisted his mother in taking inventory of the claim. By that time a sawmill on the claims had been destroyed by a falling tree, and a highline on the property was no longer operative. Tr. 58.

During the period 1953 through 1959 Dr. Gabrielson's uncle, Mr. Frank Akerill performed assessment work every year, but the mining equipment continued to deteriorate. Tr. 57. Dr. Gabrielson described the effect of the 1964 flood and slide as cleaning the creek "from point of impact and out," erasing all signs of the cabin and work, and burying the hydraulic pipes. Tr. 83. Until roads were constructed by the Forest Service in the last decade, it was necessary to walk into the claims, and to carry materials for the structures and sluices one mile down hill. Tr. 82.

Dr. Gabrielson understands that his grandfather supported himself and his family

from the mine from 1923 until 1942, but there are no records to show the amount of production from the claims, or the years when mining or processing work was carried on. Tr. 59.

Several years after he began to take an active interest in the contested claims, Dr. Gabrielson hired Dr. Arthur A. Radke, who has a bachelor's degree in mining engineering and a Ph. D. in economic geology, to study the economic potential of the property. Dr. Radke's report, dated June 30, 1962 is Exhibit K. He found that the Enterprise claim had been mined "from below the Cal-Oregon boundary to some 100's of yards up creek into Oregon," and the "gold is largely in small nugget form-angular, and found with or within quartzlmilkl [sic]. This indicates a source close at hand - from milky quartz veins." In his discussion of general geology Dr. Radke stated that the stream deposits "fill channels and cuts in the glacial moraines and only rarely rest directly on bedrock." Another significant finding is that "At least 50% of the placer gold mined to date probably came from the veins of the [L] edge Mine and other veins to the N. of the Placer ground of this party." One recommendation in the Radke report is as follows:

> "5. The original stream channel lies just N. of where mining operations are presently being carried on. Your present claims cover at least part of the old channel - probably all of it. The gold recovered to date came from just

> the S. edge of the old channel where the stream flows today. I strongly recommend working an area 750' beginning at present stream channel. . . ."

An attachment to the report, apparently related to the above recommendation, is entitled "Exploratory Drilling Pattern," and establishes more than 65 proposed locations for drilling to discover the content of subsurface material.

Dr. Radke was on the claims for ten or twelve hours a day for five days. However, his report does not indicate whether or not he took sizeable samples from the claims (there are several references to panning). Dr. Gabrielson testified that results from his own sampling ("relatively small samples") were very erratic in nature, which caused him to become discouraged. He mentioned a figure of $3 per cubic yard for one of his samples, but conceded that it was not taken in an accurate manner. Tr. 111. He also referred to the sampling of approximately 200 cubic yards of material in 1970 by a geologist, Daniel Cutshall, who reported that he obtained "1 gram of gold for every cubic yard of material mined." Exhibit J. This would have been worth about $1.13 per cubic yard at 1955 gold prices, and approximately $2.15 at today's prices. According to Dr. Gabrielson, the recovery by Mr. Cutshall fell within the range of the results from sampling performed by a miner, Bob Watson, in 1968 and 1969 ($1.80 to $3.60 per yard, at 1972 prices). Tr. 90, 96. Mr. Cutshall and Mr. Watson did not testify.

Dr. Gabrielson's estimate for bulldozing earth overburden on the claims at the persent time is 50¢ - 60¢ per cubic yard. Tr. 105. In 1955 this price would probably have been 30¢ per cubic yard. Tr. 179.

The mining claimant's current plans for attempting to recover gold on the claims stem in large part from the examinations and theories of Dr. Christopher Buckley. He received a master's degree in economic geology in 1968, and a Ph. D. in regional structural geology in 1970. Tr. 97, 162. In 1966, when he first examined the Mineral Ventures claims he was working on his masters' thesis. He also examined the claims in 1968 and 1972. He is an assistant professor of earth sciences at California State University at Fullerton, and has worked for a mining geologist in Houston, several mining corporations and the United States Geological Survey.

Dr. Buckley testified in some detail on the possibilities of developing a gold bearing horizon on the Enterprise claims. His report dated October 4, 1972 (Exhibit L), states in part:

> "Gold is present in significant quantities in the Quaternary stream gravels. The estimated area underlain by these deposits covers a distance along strike of at least 300 yards with a width of almost 150 yards. From the preliminary data there appears to be approximately $180,000 worth of gold at the current market value of $2065.00/kilogram."

His report advises that the potential for discovery is extremely good, and suggests a pilot operation to test the validity of the above deposit, "commencing in the vicinity of Greens Creek below the cabin. . ." He has concluded that the gold appears to be concentrated in the lower levels of the stream gravels, immediately above the bedrock. Because the upper levels of the stream gravels may be barren, he raises the possibility of removing those levels "prior to the initiation of gold production."

Dr. Buckley took some one cubic foot stream gravel samples from scattered locations on the Enterprise claims (the locations of seven of these samples are shown on Exhibit L). He regards the one cubic foot samples as very unreliable because of the sampling method which was utilized. He places the greatest emphasis on a larger sample (B-72-9) which was two cubic yards of bedrock stream gravels obtained from the Enterprise. He calculated his gold recovery from the latter sample at 3.05 grams per cubic yard. Exhibit L (Figure 1). He regards this sample as very representative of the "bedrock, pay dirt horizon." Tr. 147.

Dr. Buckley and several assistants also conducted a geophysical investigation in 1972 along the east side of Green's Creek in an effort "to measure the depth of unproductive overburden" with a seismograph (multiple geophone). Tr. 126. His contention is "that gold is present

only at the bedrock surface and any material overlying that of a depth of several inches is not productive. . . ." Tr. 127. He would calculate the type of deposit on the Enterprise by square yardage rather than cubic yardage. Tr. 141. He proposes that a "three foot overlaying veneer" be removed for processing. Tr. 147.

Dr. Buckley attributes the lack of further development in the area of the Mineral Ventures claims to the "depression of gold prices in recent years, and . . . the fact that a lot of the miners have been unaware of the very narrow extent of the gold occurrences. . . ." In his view the miners should have concentrated their search to the immediate vicinity of the bedrock. Tr. 153. He also regards the area as open to modern investigation techniques.

Both Dr. Buckley and Dr. Gabrielson testified that as of July 23, 1955, and at the present time, there is justification for the expenditure of time and monies for development of the Mineral Ventures property with a reasonable prospect of success. Tr. 92, 162. When the opinions of geologists or mining engineers were under discussion, Dr. Gabrielson conceded that he "didn't have anything in 1955." Tr. 101. It has been mentioned earlier that Dr. Buckley was on the property for the first time in 1966.

APPLICABLE LEGAL PRINCIPLES

In Henault Mining Company v. Tysk, 418 F 2d 766 (9th Cir. 1969), the Court, discussing the effect of the Surface Resources

Act, commented:

> "We note the reassurance of the Secretary that he is not attempting to oust Henault from its claims, but simply to gain control of the surface resources. . .The opinion of the Secretary concludes:
>
> > '[T]he determination here need not prevent further efforts by [Henault] to explore and develop mineral deposits which may be found within the limits of the claims. [Henault] is free to undertake the drilling program recommended by Wright. As long as the land remains open to the operation of the mining laws, the claimant is protected in its right to such deposits as may be found, but until a patent is issued, its use of the land embraced by the claims is limited to mining and other uses of the land incident to mining.' 73 I.D. at 195-6.
>
> In Converse v. Udall, 399 F 2d 616, 620 (9th Cir. 1968) this Court states:
>
> > 'Here, the decision does not deprive Converse of his possession or of the right further to explore his claim and make a valid discovery.'"

Where proceedings have been instituted challenging the validity of a claim, the Government need only establish a prima facie case that no discovery of a valuable mineral deposit has been made within the

limits of the claim; the burden then falls upon the mining claimant to overcome the Government's prima facie case by showing through a preponderance of the evidence that the requisite discovery has been made, and that the claims are therefore valid. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959); United States v. Nettie G. Harper, IBLA 70-640, 8 IBLA 357, 367 (1972). Government mineral examiners need not explore or sample beyond those areas which have been exposed by the claimant. They simply verify whether a discovery has been made, rather than performing discovery work for a claimant. United States v. E. Roy Grigg, IBLA 71-272, 8 IBLA 331, 343 (1972).

Converse v. Udall, supra, also involved a proceeding under the Surface Resources Act. In that case the Court said:

> "In 1905, the Supreme Court in Chrisman v. Miller, 197 U. S. 313, 322[1]/ approved and adopted the prudent man test as developed by the Land Department and stated by it in Castle v. Womble, 19 L.D. 455, 457 (1894) as follows:

1/ In Chrisman v. Miller, the Court quoted with approval:

> "***the mere indication or presence of gold or silver is not sufficient . . . .The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. . . ." (P. 322)

> 'Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.'

* * * *

We think it clear that the marketability test is applicable to all mining claims. We do not agree with Converse's argument. . .that marketability has no relevance where the discovery is of precious metals. Such a holding would be contrary to Mr. Justice Field's rationale in United States v. Iron Silver Mining Co., supra, (128 U.S. at 683) and to the rationale of the prudent man test itself. It, too, concerns itself with whether minerals are 'valuable in an economic sense,' and that is the way the courts have long interpreted it [referring to rulings of named judges]."

The Court also observed in Converse v. Udall, supra:

> "Here we deal with a contest between a locator and the Government, which is asserting its interest in managing timber in a national forest, rather than a contest between locators. This factor, we think, calls for a somewhat strict application of the [prudent man] test . . . ."

The Court concluded in Converse v. Udall that the marketability test does permit the fact finder, even in a case of a showing of gold, to consider the economics of the situation.2/ It also held that the Hearing Examiner was correct in receiving samples taken from areas exposed by Converse before July 23, 1955 even though the samples were taken thereafter, and in excluding evidence relating to areas not then but thereafter exposed (including samples taken from those areas).

Where ample time has been available for the development of mining property "the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do." See United States v. Adam S. Flurry, A-30887 (March 5, 1968); United States v. Calhoun and Howell of Oregon, Ltd., A-31504 (August 29, 1969).

2/ A Departmental decision, Nettie G. Harper, IBLA 70-640, 8 IBLA 357 (1972) discussed this point as follows:

> "A locator of a claim containing a precious mineral need not produce proof positive that the deposit could support a profitable mining operation, but 'the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result.' United States v. Santiam Copper Mines, Inc., A-28072 (June 27, 1960), quoted with approval in Converse v. Udall, supra at 623."

Reports on some samples showing very high values for gold are not conclusive evidence of a valid discovery. Other relevant factors must be considered such as the extent of mineral deposits on the claims, and the number of samples which showed mineral values to be very low or not present." United States v. C. F. Preuss, Sr., et al., A-28641 (August 22, 1961).

DECISION

The testimony of Mr. Anderson, a mining engineer with many years of experience, established a prima facie case for the Government as to all three claims. The only evidence of the existence of minerals on the Extension of Swamp and Swamp placer claims is an area on the latter claim which apparently was mined many years ago, and some colors resulting from the panning of stream gravels. The gold content in the sample taken by Mr. Anderson on the Swamp was very low, and the mining claimant presented almost no probative evidence relating to the two northerly claims. Findings in favor of the mining claimant concerning those two claims (Swamp and Extension of Swamp) could be based only upon conjecture or speculation.

Mineral Ventures has been more active in its effort to establish that a discovery exists, and has existed, on the Enterprise claim. The noteworthy feature of Dr. Radke's 1962 report is that his descriptions of general geology and mineralization correspond more closely to Mr. Anderson's testimony than to the report and oral statements of Dr. Buckley.

The two mining engineers (Radke and Anderson) emphasize the quantity of glacial rocks and debris along Green's Creek, and that the gold which is found is rough or angular, apparently coming from nearby lodes or veins. In recent years Dr. Buckley has developed the theory that the gold is from a multiple source, and that one type has been transported over a considerable distance. He also has stressed the concept that the gold occurrences are in a very narrow band close to the bedrock.

The record does not disclose whether Dr. Radke took any sizeable samples. At any rate he did not include sampling results in his report. I conclude that his designation of proposed locations for a large number of exploratory drilling sites along both sides of Green's Creek is significant. It undermines the theory that a discovery existed on the Enterprise claim as he observed it in 1962.

Dr. Buckley's academic background is excellent, but he has been a geologist for a relatively short period of time. He utilized the one 1972 sample which he considers to be reliable (approximately $6.00 per cubic yard) and advised that the "total deposit contains at least 90 kilograms of gold" with a potential value of approximately $185,000. In his multiplication he has used a deposit of 30,000 cubic yards (including the yard lying just above the bedrock). The major flaw in his calculation is his assumption that the gold content of the level adjacent to the bedrock will run in the range of $6.00 throughout the entire 100 x 300

yard gravel deposit. His survey with the multiple geophone may give him an accurate indication of the area underlain by stream gravels, but it cannot tell him what is in those gravels. The seismograph cannot take the place of trenching or exploratory drilling.

When Mr. Anderson's extensive experience is taken into account, plus the fact that he is a registered mining engineer, his 54 cent per cubic yard sample (measured up one yard from bedrock) is entitled to as much or more weight as Mr. Buckley's $6.00 sample. The other samples which were mentioned in the testimony are entitled to very little weight, because of the inexperience of the persons who took them or lack of evidence as to their qualifications. It was suggested that the thirty foot bank on the Enterprise could be mined by hydraulic means at a low cost per cubic yard. However, the testimony in this area was very general, with no analysis (1) of the expense of water impoundment areas, ditches and hydraulic equipment (ii) of the delay and expense involved in handling the many large boulders and rocks which are in the placer ground, and would be a hindrance to hydraulic operations or (iii) of the expense and difficulties associated with disposal of rocks, sand, silt and debris. Most of the discussion and projection of costs has centered around a proposal to remove about 27 feet of overburden with a large caterpillar tractor, and processing only the three foot zone above bedrock for its gold content.

If we strike a $3.27 per cubic yard average for the three foot zone above bedrock (using the Buckley and the Anderson samples), and adjust that amount to reflect the $35.00 per ounce gold price obtainable in 1955 the resulting average is approximately $1.80. Removing nine cubic yards above each cubic yard at the bottom (using Dr. Gabrielson's $0.30 per cubic yard figure) would have required an expenditure of $2.70 in 1955 just to get down to the gold bearing gravels. There would have been additional costs for processing the placer material to remove the gold, and for placing the large quantity of excavated overburden where it would not pose a problem.

Actually, there is no evidence to show what specific face of the Enterprise gravel bank was exposed in 1955. No samples were taken during the 1950's, and the work of mining engineers Radke and Anderson in the first half of the 1960's provides the most dependable clues as to what existed in 1955. It was stated that Mr. Akerill supported himself and his family from the mine during the years from 1923 to 1942. However, it is noted that Mr. Akerill was in his late 60's in 1942. He may or may not have had a family to support in the late 30's and early 40's. He may have derived part of his income from the sawmill which he built on the property. He may have mined on a profitable basis in the early years, and have been less successful with his later efforts. In the absence of records or other substantial evidence to show the quantity of gold recovered by

Mr. Akerill, and when he recovered it, the pre-1942 activities on the claim lend little or no aid to the inquiry as to whether a valuable mineral deposit existed in the summer of 1955.

The mining claimant has not shown by the preponderance of the evidence that there was a discovery of a valuable deposit of minerals on the Enterprise claim as of July 23, 1955. The mining claimant must be regarded as in the exploration stage on that claim even at the present time until it is confirmed that quantities of gold as high as those in Dr. Buckley's sample are to be found throughout the stream gravel deposit. Proof is lacking that a valuable deposit of minerals presently exists, or existed as of July 23, 1955, on either the Swamp claim or the Extension of Swamp claim.

The three claims named above are hereby declared subject to the restrictions and limitations contained in Section 4 of the Act of July 23, 1955, 30 U.S.C. § 611-615 (1970).

/s/ Dean F. Ratzman
Administrative Law Judge

§ 613. Procedure for determining title uncertainties—Notice to mining claimants; request; publication; service

(a) The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim—

(1) the date of location;

(2) the book and page of recordation of the notice or certificate of location;

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine consecutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper, in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section, and shall cause a copy of such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

Failure to file verified statement

(b) If any claimant under any unpatented mining claim heretofore located which embraces any of the lands described in any notice published in accordance with the provisions of subsection (a) of this section, shall fail to file a verified statement, as provided in such subsection (a), within one hundred and fifty days from the date of the first publication of such notice, such failure shall be conclusively deemed, except as otherwise provided in subsection (e) of this section, (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

Hearings

(c) If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearing [1] shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section shall have any force or effect upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so stipulate, then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

Request for copy of notice

(d) Any person claiming any right under or by virtue of any unpatented mining claim heretofore located and desiring to receive a copy of any notice to mining claimants which may be published as provided in subsection (a) of this section, and which may affect lands embraced in such mining claim, may cause to be filed for record in the county office of record where the notice or certificate of location of such mining claim shall have been recorded, a duly acknowledged request for a copy of any such notice. Such request for copies shall set forth the name and address of the person requesting copies and shall also set forth, as to each heretofore located unpatented mining claim under which such person asserts rights—

(1) the date of location;

(2) the book and page of the recordation of the notice or certificate of location; and

(3) the section or sections of the public land surveys which embrace such mining claim; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

Other than in respect to the requirements of subsection (a) of this section as to personal delivery or mailing of copies of notices and in respect to the provisions of subsection (e) of this section, no such request for copies of published notices and no statement or allegation in such request and no recordation thereof shall affect title to any mining claim or to any land or be deemed to constitute constructive notice to any person that the person requesting copies has, or claims, any right, title, or interest in or under any mining claim referred to in such request.

Failure to deliver or mail copy of notice

(e) If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person.

July 23, 1955, c. 375, § 5, 69 Stat. 369; June 11, 1960, Pub.L. 86-507, § 1(26), 74 Stat. 201.

[1] So in original. Probably should be "hearings".

Historical Note

1960 Amendment. Subsec. (a). Pub.L. 86-507 inserted "or by certified mail" following "registered mail" in two instances in the last paragraph.

Legislative History. For legislative history and purpose of Act July 23, 1955, see 1955 U.S.Code Cong. and Adm.News, p. 2474. See, also, Pub.L. 86-507, 1960 U.S.Code Cong. and Adm.News, p. 2356.

THE ADMINISTRATIVE PROCEDURE ACT
5 USC §557 (c)

"(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions--

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

RULE 56 FEDERAL RULES OF CIVIL PROCEDURE

Summary Judgment

(a) For Claimant. A party seeking to refover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth spe-

cific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken, or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948,; Jan. 21, 1963, eff. July 1, 1963.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MINERAL VENTURES, LIMITED, an Oregon corporation,	)	
Plaintiff,	)	**Civil No. 74-201**
v.	)	
THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,	)	
Defendant	)	

PLAINTIFF"S REQUESTED FINDINGS OF FACT

Plaintiff respectfully requests the Court to make each of the following numbered findings of fact:

1) First, as to the Swamp Extension Claim, the agency offered no substantial evidence to support a prima facie case.

2) Second, as to the Swamp claim, Anderson found wire gold and impressive looking colors. He did not weigh the gold. Without weights, he could not and did not calculate the value. Such is not substantial evidence.

3) Third, as to the Enterprise claim, Anderson's second measured sample of the deposit shows a value of 54¢ per yard. He recovered coarse gold.

4) The contested claims are on Green's Creek. Green's Creek has been worked extensively downstream and upstream from the contested claims across a mining width of about 300 feet. Tr 44, Exhibit 1. The mining width of the working face on the Enterprise runs into the hillside some 100 feet. Tr 43.

5) Mr. Harry Lee Akerill purchased the Enterprise from Mr. Colvin. Later, in 1923, he purchased the Swamp placer and Swamp Extension and acquired continuity to the structure through the canyon. Tr 56.

6) Mr. Akerill supported himself and his family by operating the mine from 1923 to about 1942 when gold mining was shut down by Executive order during World War II. When the Order was lifted, about 1946, Mr. Akerill was 72 or 73 years old. Tr 59, 57.

7) In 1942, two giants, 1700 feet of pipe line, 100 feet of four foot sluices, a mile of high line ditch, and automatic reservoir, sky line derrick, sawmill, lumber cabin and miscellaneous small tools were on the contested claims. Tr 60, Exhbiit D p. 194.

8) Mr. Akerill, Dr.Gabrielsen's grandfather, was the biggest operator. He had packed pipe and equipment necessary to do the work. There were no roads at that time. He worked for several years on the claims. "And he did recover gold, there is no question of that." Tr 42 Anderson.

9) After the grandfather died, Frank Akerill, Dr. Gabrielsen's uncle, performed the assessment work from 1953 to 1959. Tr 58-59. And in 1959 Dr. Gabrielsen got involved with the claims. Tr 59, since when he has studied, sampled and evaluated the mine with the assistance of other engineeers and geologists. The annual work was done, Tr 58. An offer was made to purchase the property and rejected. Tr 58.

10) Mr. Anderson wrote to Norma B. Rhoades February 18, 1966, requesting information as to places to be sampled on the three claims. Mr. Anderson was advised by letter March 11, 1966, that the mining claimant would send someone to the property to point out the places where the property should be sampled. Although he examined the property later, Mr. Anderson did not resspond to this offer. He made his examinations at times when company personnel was absent.

11) Mr. Anderson testified that the ground covered by the block of claims, including the Swamp and Swamp Extension is mineral in character. Tr 46. Mr. Anderson said that the roughness of the bedrock was a favorable factor for catching gold. Tr 41. But he took no samples of bedrock from the SWamp or Swamp Extension claims.

12) Anderson took only two measured samples. These were on the Enterprise claim from the same hydraulic bank. Anderson makes no mention of the percent of bank run material taken and percentage of debris which diluted the samples. His samples were taken after the 1964 landslide. He testified: "There is debris from the slide upon the top of the bank." Tr 20. His photographs of the bank show a short sluice box and debris at the bottom of the bank where Anderson sampled. Tr 4.

13) On his first sample in 1965, Mr. Anderson knew that "most of the upper yardage of the bank of ground is not the place where gold is expected to be." Tr 22.

Yet this is where he took his sample of 15 cubic feet. He hand picked the visible gold, 102 milligrams (18¢ per yard-gold at $35 per ounce) from his sluice box concentrate. He did not send it to an assayer. The sample taken was 18 feet above bedrock, taken horizontally, not vertically from that point to bedrock.

14) On his second sample, taken later, Anderson said, he "measured from bedrock up just a yard." Tr 22. "I got significantly different results, of course". And "I got 54¢ to the yard." Tr 22. He hand picked visible gold from his sluice box concentrate. He obtained 310 milligrams of gold. The remaining fines and black sand concentrate he sent to Black & Deason for fire assay and obtained 10 more milligrams of gold. Tr 22, 47, Ex 12.

15) Mr. Anderson did not use standard methods for testing his placer samples. He testified: "In a standard operation, there would probably be amalgamation someplace in the sluice system to recover the fine stuff. Most people just as soon collect a handful of that as to nuggets. The nuggets look prettier but the other counts up just as fast." Tr 48. We agree. Yet, Anderson used no amalgam in his sluice box to recover fine gold. He made no amalgam assays.

16) Anderson made no test of the fine gold in his first sample by fire assay or otherwise. He did have a fire assay made of the fines in his second sample. Fire assaying of placer samples is a misleading procedure. Mr. Anderson testified that the usual method of testing placer ground is not by fire assays.

17) Because of their small size, Anderson's two measured samples, the first 15 cubic feet, slightly more than half a yard, and his second sample of one yard, were less representative than the 100 yard sample taken by mining claimant in 1968 and the 100 yard sample taken by mining claimant in 1969, and Cutshall's 17 yard sample in 1971. Tr 102, 103, Ex. J.

18) Mr. Anderson sampled after the slide which occurred in 1964 had covered the creek bank. Tr 20. Watson, Cutshall and Buckley sampled after the slide debris had been removed and the deposit exposed as it had been in 1955 and as it was in 1940 when the property was operated. Tr 101, 109, 174.

19) Dr. Gabrielsen determined from his experience that small samples were not representative of the deposit. Tr 76. So did Dr. Buckley. Tr 158.

20) Dr. Gabrielsen calculated that $2 per yard was the average gold content of the bank run material. Tr 106. His calculations took into account 217 yards of samples, while Anderson's took into account only 1-1/2 yards of measured samples.

21) The auriferous stream gravel deposit was traced in the area for a distance of at least 300 yards along strike in a trend that seems to approximate the present course of Green's Creek. The modern creek is down cutting through this deposit and has exposed a complete cross

section from the soil horizon down to the bedrock. Spot checks for gold in the stream gravels indicated that gold was present only in the bottom level (adjacent to the bedrock). The stream gravels range in width from 250 to 350 feet for an average of 100 yards. Since the upper levels appear barren, the deposit can be approximated by the surface area rather than the volume. Dr. Buckley, Ex. L. p. 3, Tr 157, 161.

22) Sample B72-9 yielded a total weight of 6.1 grams from the bedrock area. The approximate dimensions of sample were 6 feet by 3 feet taken from the lower 3 feet of the stream gravels. Dr.Buckley Ex. L. p. 3, Tr 157, 161.

23) Since the stream gravels underlie an area of at least 100 x 300 yards, the deposit contains 30,000 cubic yards (including the lower yard). With a yield of 3 grams per yard, the total deposit contains at least 90 kilograms of gold. Dr. Buckley, Ex. L, p. 3, Tr 157, 161.

24) Mr. Anderson did not find any placer type gold, but only rough particles of lode gold with quartz still hanging onto it, indicating that it had not been transported a great distance but had barely been removed from the lode in which it was originally formed. Tr 33-34.

25) Mr. Anderson did not perceive, like mining claimant's experts did, that the economically important producing horizon which underlies the claims is not the result of the work of the present creek, but is the ancient stream bed of

an earlier stream which meandered over an old peneplain depositing stream-rounded gravels and boulders of varied kinds of rocks and rounded gold which had been transported a long distance. Tr 35-37, 135, 149.

26) Anderson testified that the gold he found was in glacial gravel. Tr 28. Dr. Buckley sampled an older stream deposit. Tr 172-173. Dr. Buckley explained that two types of gold are present: (1) rough, angular gold and wire gold which had not been transported far from its source, and (2) smooth, worn gold with rounded edges which indicated a tremendous amount of transportation. Tr 172-173.

27) Mr. Anderson's examination and sampling did not appraise correctly the gold values in the deposit, for the evidence shows that he did not realize that it has been enriched from more than one source.

28) Mr. Anderson did not understand the geology of the deposit. Although he agrees that knowledge of the geology of the area is certainly very important to a determination whether placer gravel has potential, Tr 47, he was not familiar with the published literature such as the U.S. G.S. bulletins published on the geology of the area.

29) Anderson did not realize that in addition to the gold carried in the glacial gravels, the deposit is enriched by gold laid down in the bed of the ancient stream which meandered across what

was then a great peneplain. Tr 37, 30, 31, 33. Mention of the Klamath peneplain and the Sherwood peneplain "rang no bells" to him. Tr 30, 31. He did not know whether the claims lie within the well-known Klamath geological province divided by the Oregon-California state line. Tr 31.

30) Dr. Gabrielsen testified that he intended to hydraulic mine the property. He said on a large scale, hydraulic mining can be done for a few cents a yard, maybe as cheap as ten cents a yard. The costs were less in 1955. Tr 74-75.

31) Considering the alternative of moving the ground with heavy machinery, Dr. Gabrielsen said he knew he could process it for fifty cents a yard. Tr 105. If he could do it for less, it would be beautiful. Tr 107. This type of operation would leave a suitable profit - certainly at 1955 costs.

32) Mr. Anderson gave no evidence as to the cost of hydraulic mining. The mine has never been mined any other way. Historically, the overburden has been removed by water. Mr. Anderson chose to give higher costs for an alternative method. He substitutes the expensive method of mining the ground by bulldozer for the less expensive method of mining by water. Mr. Anderson did not have the benefit of the hydrology report by Mr. Bernard. He did not have knowledge of the surveyed water source and its adequacy for hydraulic mining. Dr. Gabrielsen verified his costs for the alternative method with the equipment manufacturers. Tr 105. Mr. Anderson did not.

33) The quantity of gold-bearing gravel is sufficient. The maps show the discovery of the developed area and the working bank in the diggings near the Akerill cabin. They also show an extensive area worthy of exploratory drilling. Dr. Radke strongly recommended the staking of additional ground and its drilling. This adds to, rather than detracting from the value of ground exposed for hydraulic mining.

34) Dr. Gabrielsen testified that the minimum flow is 1.25 cubic feet of water per second, about 500 gallons per minute. He testified that hydraulic mining was a cheaper alternative than bulldozing at 50¢ per yard. Tr 74, 75.

35) Plaintiff relied upon three independent samplings of the large volume samples with overall average values on the order of $2 per yard for the entire section. Tr 76. Dr. Gabrielsen.

36) Bob Watson, under Dr. Gabrielsen's supervision, took a large bulk sample, about 100 yards, in 1968 and about 100 yards in 1969 along the open face exposed in the creek. Six ounces of gold were extracted. Computed on 200 yards, the price was $1.80 a yard, and computed on the basis of the new material in the face, excluding the debris, the yardage averaged about $3.50. This was a large scale sampling program. Tr 83, 84.

37) Dan Cutshall, B.Sc., geologist, was hired to make a second bulk sampling. He ran 14 or 17 yards and recovered gold, some smooth and worn, and some very rough, with quartz. Mr. Cutshall's numbers came

out at a value of $2.20 a yard, which falls into the bounds of the yards that Watson sampled.

38) The price of gold was $35 an ounce in 1955. The price commenced to rise in 1969 and has gone up nearly $200 per Troy ounce at the present time (1974).

39) The average grade of placer ground mined in 1970 was worth in gold 52-1/2 cents per ton, and in per cent for placer gold it was 0.00015. The Department of the Interior 1970 Minerals Year Book, Vol. 1, U.S. Bureau of Mines, Washington D. c. (1972) pp. 73-74.

40) The witnesses who gave evidence for the plaintiff were qualified and experienced. The mining claimant offered the testimony of Dr. Christopher Buckley, PH. D. (geology, Rice), the evidence of Dr. Arthur S. Radke, Ph, D. (geology, Stanford University), the evidence of Ronald D. Bernard, B.Sc. (engineering, Oregon State University., M.Sc. Hydrology, Stanford University), Daniel F. Cutshall, B.Sc. (geology, San Jose State Universty) and his bulk sampling, Bob Watson, a practical miner, and his bulk sampling, and the testimony of Dr. Bernard L. Gabrielsen, Ph. D. (engineering, Stanford), together with Exhibits A through N, Q and R, gold nuggets, reports by the Oregon State Department of Geology and Mineral Industries and by the California Department of Mines.

41) Dr. Gabrielsen and Dr. Buckley illustrated their testimony by colored slides, P 1 through P 25. Tr 114.

42) Christopher Buckley, B.Sc. geology, M.Sc. economic geology, Ph.D. (Rice Institute, geology) testified. His interest is in economic geology mainly. Dr. Buckley has been employed as a geologist for the U. S. Geological Survey. He has worked for Phelps Dodge, for the Tenney Company, and for consulting firms in Los Angeles and in Texas. He has written a number of technical publications. Tr 98, 99. Dr. Buckley is Assistant Professor of Earth Sciences, teaching structural geology, geophysics and economic geology at the California State University at Fullerton.

43) A man of ordinary prudence would be justified in spending time and money with a reasonable prospect of a profitable venture on or before July 23, 1955. Based on the accounts of past mining operations, the mining claims would have been more economic in 1955 than they are today. (1972) Tr 163, 192, Dr. Buckley.

44) Dr. Arthur S. Radtke, B. Sc., mining engineering, M.Sc. and Ph. D. in economic geology (Stanford) Tr 58, worked for United States Steel in connection with geologic evaluation of mining properties. He worked for Columbia Iron Mining Company, which is a subsidiary of United States steel, two or three seasons. Dr. Radtke is currently employed as a career geologist with the U.S.G.S. in the Carlin, Nevada area.

45) Dr. Radke and Dr. Gabrielsen had a consensus of opinion as to the merits of the mining claims as a result of a joint study of the property from June 25

through June 30, 1962. Tr 69. Dr. Radke said: "I feel the placer claims our corporation controls have good potential financially from more than one point of view. I have examined a large number of placer areas and this one presents several good chances for gold ..."

46) Dr. Radke strongly recommended proceeding with the development of the property and applying for an Office of Minerals Exploration loan. He said the property had economic potential and recommended the property to Dr. Evan Just, formerly editor of the Mining Engineering Journal, who was then head of the Department of Geology at Stanford, and who had studied and expressed interest in that region. Tr 67.

47) Ronald D. Bernard, B. Sc. Oregon State, M.Sc. Stanford, is a licensed engineer in three states. Hydrology is his field. Tr 73. He made a study to determine how water could be impounded to get an adequate supply for hydraulic mining of the property. Tr 74. The cost of hydraulic mining may be as cheap as ten cents per yard to move large quantities,, and the costs were less in 1955. Tr 75, Ex. F.

48) Bernard L. Gabrielsen, Ph. D. engineering (Stanford), with a background in geological engineering and civil engineering, has had experience in mining for over fifteen years.

49) True, Dr. Buckley had only a master's degree in geology when he examined the claims. His level of experience had increased six years later when he testified. At the time he testified, he had his doctorate in economic geology.

50)Colver F. Anderson, B. Sc. was the only witness for the Government. He is not a graduate of any school of mines. He has no "Engineer of Mines" degree. He has no degree in geology. He does not claim to have had any practical placer mining experience. His experience and background have been that of a mill helper, welder, assayer, cyanide mill operator and metallurgical engineer. He is a member of the Society of Metallurgical Engineers, not the Society of Mining Engineers.

51) Mr. Akerill did not "derive part of his income from the sawmill which he built on the property" (p.11) There is no least evidence that the sawmill was used for any purpose beyond making the lumber needed for the buildings and sluice boxes essential for the mining oeration. The surmise that Mr. Akerill engaged in an illegal use of the timber on the claims is without basis in fact.

52) Exhibits slides numbers P-1, P-2 and P-3 show the Green's Creek drainage basin after the landslide of 1964. Exhibit P-4 shows some of the debris that washed out during the slide.

53) Exhibit P-5 shows the cabin constructed by Dr. Gabrielsen. The photo was taken in 1970.

54) Exhibit P-6 shows the Green's Creek area below the cabin. The picture was taken in 1968, when debris was being removed to make room for Mr. Watson's taking a sample. The view is looking downstream in a southwesterly direction into the portion of the claim in California. Tr 117.

55) Exhibit P-7, taken in 1966, shows dirt being shoveled into a sluice box. The contact between the bedrock and the local stream gravels is marked by a red zone. It shows sampling of the gold content of the contact between the bedrock and overlying stream gravel. Tr 118. Exhibit P-8 shows the same contact between the bedrock and the overlying stream gravels. The photo was taken in 1966 on the Enterprise claim. Dr. Buckley, Dr. Gabrielsen (center) and to the left, Dr. Ed Johnson. The red is the working face of the previous operation and the stream above this point is in its natural state. Several grams of gold were produced in about six hours. Half a dozen gold pans full of the red pay dirt were shoveled into the sluice box. Tr 119-123.

56) Exhibit P-9 shows the two foot by fifteen foot sluice box set up on the bedrock for Dan Cutshall's sampling in 1970. Debris and slough down from the previous season is being cleaned out. The picture shows the height of the bank, approaching 30 feet. Tr 123-124. It is developing the face for future mining. The material from the top of the bank down to where they were mining is unproductive. Tr 125.

57) Exhibit P-10 shows the seismograph instrument used in 1972 to determine the depth of unproductive overburden, the depth from the surface to bedrock. The method of testing is described Tr 125-129.

58) Exhibit P-11 shows Dr. Gabrielsen providing the impact or impulse which is transmitted through the ground by the principle of refraction. The sound impulse measures depth to bedrock. Tr 126. This is development work to block out tonnage. Tr 130. It is a geophysical examination. P-12 shows the instrument recording the sound waves in the geophysical examination of the depth of overburden overlying the bedrock.

59) Exhibit P-13 shows the sluice box set up by Bob Watson in 1968. He is on bedrock, probably 20 feet out from the bank. A huge quantity of debris had washed down from the slide in the winter of 1964. It was discovered in the summer of 1965. Lumber was packed in in 1966 and 1967 and in 1968 and 1969 Bob Watson set up the sluice and giants and got a hoist in there to clean it up and restore a working face. Tr 133.

60) Exhibit P-14. Rock had to be moved out by hand to expose a site to set up the sluice box. The rounded rocks resting on the bedrock surface show that they are stream gravels, rather than glacial deposits. Tr 135. The unproductive part of the overburden has very angular fragments. It is sheet wash from the adjacent slopes. Since there was no type of mechanism to mechanically concen-

trate the gold, this material would not be expected to sample well. Tr 136. The July 1972 sluice box head rests on the bedrock. The weathered stone shows red. Tr 137-138.

61) Exhibit P-15. Working to expose the older working face of the mine which was productive in the 1930's and early 1940's. The unproductinve materials are beige or light brown in color, as opposed to the fairly intense red of the weathered zone. Tr 138.

62) Exhibit P-16. The 1972 sluice box from the top of the bank on the east side of Green's creek. Shows rounded boulders, indicative of a stream gravel type deposit, rather than a glacial deposit. Tr 139. This is testing the working face which was a deposit known in the 1930's and early 1940's. It is on the Enterprise claim. Example of the working face of the past mining operations. Tr 140-141.

63) ExhibitP-17 shows rounded boulders and the tremendous variation in the types of rocks present in this stream gravel deposit. Tr 141-142.

64) Exhibit P-18. The 1972 sluice box test of an area three feet by six feet. Exhibit P=19 shows the measured area three feet by six feet tested in the sluice box. Tr 144. It was measured very accurately. The picture shows the bedrock and loose residual material that was removed by hydraulic pipe. Tr 145. The sample yielded 6.1 grams of gold. Tr 147. The nuggets encountered were excluded from the results of the sample. Tr 148-149.

65) Exhibit P-20 shows the sluice box being removed after the 1972 sample was run through it. Tr 148. P-21 shows the sluice box being dismantled and the residual material being scraped from the riffles. Tr 148.

66) Exhibits P-22 and P-23 show the residual material from sluice box riffles being panned down. The nugget at the right hand side of Exhibit P-24 was excluded from the sample.

67) Slide No. P-25 shows some of the gold recovered. This gold is very angular, while some of that recovered was smoothly rounded, which indicates transportation over a considerable distance. This gold did not travel so far. The presence of the two types of gold indicates this is a multiple source type of deposit. Tr 149.

68) On the issue of agency jurisdiction, the agency offered only three exhibits to support its allegation in paragraph 4 of the administrative complaint: Published notice to mining claimants 1960 applied to and described only lands in Oregon, none in California. Ex. 14, Tr 15.

69) The affidavit of examination refers to ground in Oregon; there was no affidavit of examination of ground in California. Ex 13, Tr 15. The certificate of nonexistence of tract indexes refers to Oregon but not to land in California. Ex 15, Tr 15. The mining claimant's verified statement is absent from the transcript. And no certificate of title or title report was made of the ground in Oregon or of the ground in California.

70) Mining claimant's Exhibit C is a letter of March 11, 1966, from Wm. B. Murray, attorney for the mining claimant, to the U. S. Dept. of Agriculture, Forest Service, Rogue River National Forest, 315 P. O. Building, Medford, Oregon, attention Mr. Colver Anderson, Mining Engineer, which states that the claims were partly in California and partly in Oregon. Tr 3, 14 IBLA 98.

71) On September 3, 1972, prior to the hearing held October 24, 1972, mining claimant's counsel wrote to the Director, Oregon State Office of the Bureau of Land Management, U.S. Dept. of the Interior, 729 N E. Oregon St., Portland, Oregon re Contest No. OR-09999E (P. L. 167) involving the Swamp, Extension of Swamp, and the Enterprise Placer Mining Claims located in SEc. 13, T. 41 S., R. 9 W. W. M. Josephine County, Oregon:

> "In connection with the above matter, we would like to examine the publication procedure followed by Forestry and the Bureau of Land Management when publishing notice under the Act of July 23, 1955. The above described land is situated primarily in Oregon and partly in California."
>
> Respectfully submitted,
>
> /s/ William B. Murray
> Attorney for Plaintiff
> 1606 Standard Plaza
> Portland, Oregon 97204
> 226-3819 "

No. 77-176

In the Supreme Court of the United States

OCTOBER TERM, 1977

MINERAL VENTURES, LIMITED, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1—A-2) is not reported. The recommendation and order of the United States Magistrate and the order of the district court (Pet. App. A-3—A-11) are not reported. The opinion of the Department of the Interior Board of Land Appeals (Pet. App. A-12—A-36) is reported at 14 IBLA 82.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1977. The petition for a writ of certiorari was filed on August 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Department of the Interior lacked jurisdiction under Section 5 of the Surface Resources Act of 1955 to determine the surface rights to petitioner's unpatented mining claims, where petitioner had actual notice of the determination and participated in it, because the non-existence of tract indexes for the area prevented preparation of the certificate based on examination of such indexes which the Act provides for in order to assure notice to interested parties.

2. Whether a district court must conduct a trial and make findings of fact, and may not render a summary judgment, when reviewing an adjudication by the Department of the Interior, made on the record after an agency hearing, to determine whether that adjudication was supported by substantial evidence.

3. Whether substantial evidence supported the Department of the Interior's decision that the surface resources overlying petitioner's unpatented mining claims were subject to management by the government because petitioner had failed to establish the discovery of valuable mineral deposits on the claims.

STATUTE INVOLVED

Section 5 of the Surface Resources Act of 1955, 69 Stat. 369, as amended, 30 U.S.C. 613, is set forth at Pet. App. A-58—A-62.

STATEMENT

Section 4 of the Surface Resources Act of 1955, 69 Stat. 368, 30 U.S.C. 612, generally reserves to the United States the right to manage and dispose of the surface resources of unpatented mining claims located after July 23, 1955, the Act's effective date. With respect to unpatented claims located before that date, Section 5 of

the Act, 69 Stat. 369, 30 U.S.C. 613, sets forth a procedure for determining the government's surface rights and the rights of persons asserting interests in such claims.

Under Section 5(a), agencies responsible for administering surface resources of public lands may request the Department of the Interior to publish a notice to mining claimants for determination of surface rights. The request must be accompanied by an affidavit showing that the lands have been physically examined to determine whether anyone is in actual possession of them or is working them, and must be accompanied also (30 U.S.C. 613(a))—

> by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's[,] abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, * * *.

The statute (*ibid.*) then defines "tract indexes" as—

> those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

The notice published by the Department of the Interior notifies any interested person to file a verified statement describing his interest in the unpatented mining claim. *Ibid.* If such a statement is filed, the Secretary of the Interior is directed to conduct "a hearing to determine

the validity and effectiveness" of the mining claimant's interest, insofar as it is contrary to or in conflict with the government's claim to surface resources. 30 U.S.C. 613(c). "The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." *Ibid.*

The validity of an unpatented mining claim located on public lands depends, *inter alia*, on the discovery of a valuable mineral deposit. Rev. Stat. 2319, 30 U.S.C. 22.

Pursuant to Section 5 of the Surface Resources Act, the Chief of the Forest Service, United States Department of Agriculture, requested the Department of the Interior to publish a notice for a determination of whether the United States had the right to manage the surface resources of petitioner's three unpatented mining claims in Siskiyou National Forest, Oregon (Pet. App. A-15). The request was accompanied by an affidavit attesting that the lands had been examined and that no one was in actual possession of them or was working them, and by a second affidavit attesting that no tract index for the area existed. A notice to mining claimants was published and actual notice was received by petitioner, which filed a verified statement setting forth its interest (Pet. App. A-5, A-35). A hearing was then conducted before an administrative law judge (Pet. App. A-15).

The administrative law judge rejected petitioner's contentions that alleged defects in the notice and its accompanying affidavits required dismissal of the proceeding. He held that the notice was not defective and that no prejudice to petitioner had been shown (Pet. App. A-37—A-39). On the merits, the administrative law judge found that petitioner had not established discovery

of a valuable mineral deposit prior to July 23, 1955. The evidence showed that the claims contained assayable gold ore. It was in conflict, however, as to whether extraction of the gold was economically feasible. Resolving the conflict, the administrative law judge found that it was not (Pet. App. A-39—A-57).

The Interior Board of Land Appeals affirmed (Pet. App. A-12—A-36).

Petitioner sought judicial review of the agency's decision in the district court under 5 U.S.C. 704. The Secretary, relying on the administrative record, moved for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure. Petitioner moved for judgment on the record (Pet. App. A-3). The district court adopted the recommendation of the magistrate that the Secretary's motion should be granted (Pet. App. A-3—A-10).

The court of appeals affirmed (Pet. App. A-1—A-2). It agreed that substantial evidence supported the determination "that no valid discovery of a valuable mineral deposit had been made prior to the effective date of the Act" (Pet. App. A-1). It concluded, however, that insofar as the administrative determination involved a portion of one of petitioner's claims that was located in California and had not been so described by the notices, the district court's judgment should be vacated and remanded for entry of an amended judgment limited to the claims within the State of Oregon.[1]

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[1]A portion of petitioner's Enterprise claim extends 1,000 feet into California. It was not so described in the notice. The ALJ held that the California portion did not have to be considered because petitioner's predecessors in title had split it from the Oregon portion and the government had relied on information to this effect furnished by the claimant's attorney (Pet. App. A-38). The IBLA agreed, but extended the decision to the California portion on the ground that

ARGUMENT

1. Petitioner contends that the Department of the Interior lacked jurisdiction over the proceeding because the request of the Department of Agriculture for a determination of the government's surface rights was not accompanied by a certificate of title based on either a title search by a government attorney of tract indexes showing mining claims in the county records, or a certificate of title prepared by an abstract company or a title abstractor (Pet. 19). The statute on its face rebuts this contention. It provides that the certificate is to be "based upon * * * examination of those instruments which are shown by the tract indexes in the county office of record * * *." 30 U.S.C. 613(a). "Tract indexes" are defined as "those indexes, if any," that identify instruments as affecting particular subdivisions in surveyed or unsurveyed lands. *Ibid.* If there are no tract indexes, there can be no certificate based on an examination of instruments shown by such indexes. The district court correctly held (Pet. App. A-5) that "as the Act only requires a certificate of title to be made from examination of a tract index, the nonexistence of a tract index excuses compliance with the provision." *Converse* v. *Udall*, 262 F. Supp. 583, 592 (D. Ore.), affirmed, 399 F. 2d 616 (C.A. 9), certiorari denied, 393 U.S. 1025. Moreover, as the district court found, petitioner "was completely informed of the proceeding because it filed a timely verified statement" (Pet. App. A-5). Since petitioner had actual notice and a full opportunity to present its case, it has no grounds for complaint.

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by failing to describe that portion in its verified statement, petitioner had waived its rights under Section 5 (Pet. App. A-32). In effect, the court of appeals agreed with the ALJ that the case was confined to petitioner's claims in Oregon.

2. Equally without merit is petitioner's contention (Pet. 8-18) that in reviewing the record the district court should have conducted a trial to resolve disputed issues of fact and should have made findings of fact. The adjudication in this case was required by the Act to be made on the record after notice and opportunity for a hearing in accordance with the procedures governing contests affecting public lands. 30 U.S.C. 613(c); 5 U.S.C. 554. In such proceedings it is the agency's responsibility to resolve all material issues of fact. 5 U.S.C. 557. The district court's function on review of such a determination is to examine the record to determine whether the agency's resolution of the issues is supported by substantial evidence and is in accordance with law. 5 U.S.C. 706. On such review evidence outside the administrative record is ordinarily inadmissible. See, *e.g.*, *City of New York* v. *United States*, 337 F. Supp. 150, 162 (E.D. N.Y.) (three-judge district court); *Nickol* v. *United States*, 501 F. 2d 1389 (C.A. 10); *Foster* v. *Seaton*, 271 F. 2d 836, 838 (C.A.D.C.). Summary judgment is therefore an appropriate procedure. *Dredge Corporation* v. *Penny*, 338 F. 2d 456, 462 (C.A. 9); *Henrikson* v. *Udall*, 229 F. Supp. 510 (N.D. Cal.), affirmed, 350 F. 2d 949 (C.A. 9), certiorari denied, 384 U.S. 940.

In this case the district court's decision granting summary judgment was accompanied by a report of the United States Magistrate (Pet. App. A-3—A-10), adopted by the district court (*id.* at A-10), which explains the grounds for the decision. Contrary to petitioner's contention (Pet. 10), the ruling of the court of appeals is therefore consistent with *Nickol* v. *United States*, *supra*, which held that a district court should not grant summary judgment on review of an administrative record without indicating "how it arrived at its conclusions, and what, in its opinion,

were the operative facts for which it found the substantial evidence." 501 F. 2d at 1391. Accord, *Multiple Use, Inc.* v. *Morton*, 504 F. 2d 448, 452 (C.A. 9). See *Heber Valley Milk Co.* v. *Butz*, 503 F. 2d 96 (C.A. 10).

3. The two courts below correctly held that substantial evidence supports the administrative determination. No discovery of a valuable mineral deposit under 30 U.S.C. 22 was shown because petitioner failed to establish that it was economically feasible to extract the gold ore on its claims. 30 U.S.C. 22. See *United States* v. *Coleman*, 390 U.S. 599. As the court of appeals noted (Pet. A-2):

> The evidence before the administrative law judge was in conflict. The government witnesses tended to prove that the low-yield, scattered showings of gold were not worth the cost of recovery. The claimant's evidence tended to show that some valuable mineral had been recovered between 1920 and 1940, but this generalized testimony failed to satisfy the trier that there was a discovery under the test of *United States* v. *Coleman*, 390 U.S. 599 (1968).

There is no reason for this Court to re-examine this essentially evidentiary issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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